GORMULLY & ORDE,
BARRISTERS
OTTAWA, ONT.

THE LAW OF BAILMENTS.

MOWAT, MILLY & ORDE
BARRISTERS
OTTAWA, ONT.

THE

LAW OF BAILMENTS,

EMBRACING

DEPOSITS, MANDATES, LOANS FOR USE,

PLEDGES, HIRE, INNKEEPERS,

AND

CARRIERS.

BY

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WITH

Notes to Canadian Cases,

BY

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To the Memory of

THE HON. D'ARCY BOULTON,

Sometime Judge of the King's Bench, Upper Canada,

The Canadian Notes

In this Work are Dedicated by his Great Grandson,

The Author.

A. C. F. B.

PREFACE.

SIR WILLIAM JONES, so long ago as 1781, wrote, in the introduction to his excellent Essay on the Law of Bailments, "There is hardly a man of any age or station who does not every week, and almost every day, contract the obligations or acquire the rights of a hirer or a letter to hire, of a borrower or a lender, of a depositary or a person depositing, of a commissioner or an employer, of a receiver or a giver in pledge; and, what can be more absurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights of which we have no just idea?" Surely all this is as true now as it was in the days of Sir *William Jones*. Yet no *English* writer, since the last edition of the Essay of Sir *William Jones*, has published a new book on this important subject, or has, since 1833, even re-edited Sir *William Jones'* classical work. This is the only excuse I offer for presuming to place before the legal world the present work. I trust its readers will find an accurate statement of the English law, and that I have so arranged the topics as to give my readers a comparative and historical view of the various classes of Bailments.

At pp. 2, 3 of his Essay, Sir *William Jones* expresses his astonishment "that so important a branch of jurisprudence should have been so long and so strangely unsettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, the doctrine of Bailments should have produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part, perhaps, of juridical learning; at least than any other part equally simple."

"The Law of Bailments," says *Story*, ch. I., s. 1, "lies at the foundation of many commercial contracts, and therefore is

entitled to receive a distinct and independent consideration. It is of perpetual, although tacit, reference in the law of shipping and factorage; and a just understanding of it seems preliminary to a full discussion of those heads, as well as of many other important heads in our jurisprudence."

Story's work on Bailments is indeed a splendid monument of learning, in which he most copiously refers to the civil law, the code civil of France, the American codes of Alabama, Louisville and New York, the local jurisprudence of the various American States, and numerous supreme and circuit court reports of America. How far some of these authorities are of any or no use at all in English courts, will appear from the following citations:—

The civil law.—"On the argument, much reference was made to the civil law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bind us" (*Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, at p. 660: *Blackburn*, J., delivering the judgment of the court (*Martin*, B., *Blackburn*, J., *Bramwell*, B., *Shee* and *Lush*, JJ.)).

American authorities.—"We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own courts, is wrong. Among other things it invokes an inquiry, which often is not an easy one, whether the law of *America* on the subject in which the point arises is the same as our own" (*In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, at p. 330: Lord *Halsbury*, L.C.).

"I also have been struck by the waste of time occasioned by the growing practice of citing American authorities" (*ibid.*, *Fry*, L.J.).

"I have often protested against the citation of American authorities" (*ibid.*, at p. 331: *Cotton*, L.J.).

Adapting the law of England to that of other countries.—"It is useless to inquire whether the law is, as stated, the

same in all European countries. For if it is, yet no English court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the co[illegible]ate law of America, it has been declared over and over again, that the English and American courts have diverged upon this particular head of law,—the law of general average" (*Svensden* v. *Wallace* (1884), 13 Q. B. D. 69, at p. 73: *Brett*, M.R.).

Little, as a rule, is known in England by practitioners of the calibre or the relative merits, as lawyers, of American judges and reporters.

My endeavour has been to state what is the English law of Bailments. Throughout my part of this work I profess to give only English ruling principles and leading cases, arranging the latter, as far as possible, in chronological order, thus giving the history and evolution of the law. I again adopt the plan I used in "Cardinal Rules of Legal Interpretation," namely, that of supporting and elucidating general principles, doctrines, propositions and rules, by giving, *ipsissimis verbis*, English judicial statements as reported—such statements often being short essays by most eminent judges—together with occasional extracts from well-known text books; thus, I hope to save practitioners much time and trouble.

Mr. Justice *Byles*, in his Preface to the First Edition of his Treatise of the Law of Bills of Exchange (1829), says, "In many cases the reader will, however, find the law laid down in the very words of the judgment, a plan which the Author has been induced to adopt, partly that those who may not have ready access to the authorities may be satisfied that the law is correctly stated; and partly because he distrusted his own ability to enunciate, on so complicated a subject, a general rule, neither too narrow nor too wide, beset, as almost all such general rules now are, with numerous qualifications and

exceptions." Not only "in *many* cases," but in *most* cases the very words of both text writers and the courts are given in this Work.

Each subject-matter, as far as I can do so, is treated in the same regular order and on the same plan; a method intended to help the memory, and to render a comparative view more easy. I have concerned myself more with the "*reason* and *spirit* of cases" which make law, and the statement of general principles than with facts. The latter are only given where they illustrate general rules and principles.

As *Story* made free use of Sir *William Jones'* Essay, so I have made considerable use of the former's commentaries on the Law of Bailments. As, however, points may arise which are new to, or undecided by, English courts, which have been dealt with by the American courts, the practitioner will naturally like to consult the American cases alluded to in the latest editions of *Story* or *Edwards*. It may, therefore, be useful here to give the following short accounts of the American courts, and of the finality and conclusiveness of their decisions.

ABBOTT'S NATIONAL DIGEST (1867), REPORTS AND STATUTES, Vol. I., p. vii.

"The United States Courts." — *Supreme Court; Circuit Courts; State Courts.*—"By the American Constitutions, the Federal Government is vested with the administration of the external relations of sovereignty, as well as of certain subjects of municipal law which are deemed to affect equally the citizens of the whole country. Hence, the decisions of the Supreme Court of the United States are, in general, final and conclusive upon all the other courts of the country, on all questions turning upon the organic law of the nation, and on all questions of the validity or construction of any act of Congress, or any treaty made by the United States, or any authority exercised under the United States. The deference paid to the decisions of the Supreme Court upon these subjects is, to some degree, shared by the decisions of the Circuit

Courts, which are held by justices of the Supreme Court, associated with local judges, in various parts of the Union.

"Upon questions of general commercial law, as well as others upon such other subjects as depend rather upon general principles than any local regulations;—such as the doctrines of criminal law and the rules of evidence,—the decisions of the Supreme Court may be said to have an equal weight with the decisions of the courts of last resort in the various States. Upon these subjects more or less diversity of authority often arises between the courts of the different States. And although the courts of a State follow, often, the rule clearly established by their own precedents, in preference to a different rule established by the Supreme Court of the United States; yet, in the absence of any controlling precedent in their own courts, the judges of State courts would regard the decisions of the United States courts as a guide of equal authority, as the decisions of the courts of any other State than their own. Especially is this the case upon subjects of commercial law, in which it is felt to be of great importance that decisions should be uniform; and on these subjects the judgments of the Supreme Court of the United States are received with much respect, and followed, to a great extent, even in the courts of last resort of the several States.

"There remains a class of cases in which the decisions of the United States courts are of secondary authority.

"Those courts have jurisdiction in many cases because of the political character of the parties, without respect to the subject-matter; hence, they are often called upon to construe State constitutions, and to administer State laws. In these cases, it is the uniform rule of the United States courts to recognise and follow the rules clearly established by the judicial decisions of the highest courts of the State whose laws they are called upon to construe and apply.

"Upon this class of questions, therefore, their decisions are of less weight as precedents than the decisions of the courts of the State in question."

KENT'S COMMENTARIES ON AMERICAN LAW, 14th ed., by *John M. Gould*, Ph.D., 1896, Vol. I., pp. *444, *445.

"The federal administration of justice has a manifest superiority over that of the individual States, in consequence of the uniformity of its decisions, and the universality of their application. Every State court will naturally be disposed to borrow light and aid from the national courts, rather than from the courts of other individual States, which will probably never be so generally respected and understood. The States are multiplying so fast, and the reports of their judicial decisions are becoming so numerous, that few lawyers will be able or willing to master all the intricacies and anomalies of local law, existing beyond the boundaries of their own State. Twenty-six independent State courts of final jurisdiction over the same questions, arising upon the same general code of common and of equity law, must necessarily impair the symmetry of that code."

From the above extracts it will be seen how necessary it is to be thoroughly versed in the local laws before the decisions of the State courts can be properly appreciated.

Having given the above extracts with reference to the United States courts, I will add a few words concerning some of the American reports. My information is gathered from "The Lawyer's Reference Manual of Law Books and Citations," by *Charles C. Soule*; Boston: Soule and Bugbee, 1883. It appears that there were, in 1883, over 3,200 volumes of Federal, State, and Territorial Reports, without counting condensed editions, reprints, digests, statutes, law journals, or elementary books; and it is there said that this number was increasing at the rate of over a hundred volumes yearly. In the book just referred to, the reader will find a list of American Reports, Digests, and Statutes, with brief notes in regard to editions and peculiarities, and the abbreviations recommended. Abbott's National Digest, before referred to, may also be consulted on this subject.

The following list of excellent Reports may be of service:

UNITED STATES SUPREME COURT REPORTS.

Reports.	Vols.	Abbreviations.	Period Covered.
Dallas	4	Dall.	1790—1806
Cranch	9	Cranch	1801—1815
Wheaton	12	Wheat.	1816—1827
Peters	16	Pet.	1828—1842
Howard	24	How.	1843—1860
Black	2	Black	1861—1862
Wallace	23	Wall.	1863—1874
United States Reports	174	U.S.	1875—1899
CIRCUIT COURT REPORTS.			
Gallison	2	Gall.	1812—1815
Mason	5	Mas.	1816—1830
Sumners	3	Sumn.	1829—1839
Story	3	Story	1839—1843

My most grateful acknowledgments are due to my friend, Mr. HARRY PROCTER, of Lincoln's Inn, for his untiring and unsparing help in the revision of the proof sheets, and for his valuable suggestions while the book was passing through the press.

EDWARD BEAL.

5, PAPER BUILDINGS, TEMPLE,
March, 1900.

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PREFACE TO THE CANADIAN NOTES.

A LEARNED AUTHOR has truly said that "Rome rules to-day by force of her reason when she has long since ceased to rule by force of her authority." A body of laws so admirable as the Civil Code, bequeathed to us by ancient Rome, must ever appeal to the jurists of all civilized countries, and, if her system has not been bodily incorporated into English law, it has none the less provided a basis upon which our law in general, and the law of Bailments in particular, has been largely founded. And, if the Roman law has so profoundedly influenced the jurisprudence of the civilized world, so, too, has the English law influenced that vast portion of the globe which has been settled by members of the Anglo-Saxon race. The laws of the United States and the great British Colonies are based upon English law. That this is the case is no more than its due, and the highest praise of a system of law under which the Empire has spread, and is spreading in the security afforded by a jurisprudence founded upon principles of reason and justice. The Dominion of Canada owes much to the parent land, and in the adoption of the English common law she has proved her faith in the principles which have so long guided our English Courts of Justice. That she may never cease to be inspired by such principles is the hope of the Author of these Notes, who has compiled them with the earnest desire that this work may be made of additional value to his legal brethren on the other side of the Atlantic.

A. C. FORSTER BOULTON.

2, PUMP COURT, TEMPLE,
March, 1900.

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INTRODUCTION.

THE gift of responsible government to Canada, followed by the federation of the various provinces into one Dominion, has given rise to a new condition of things within the British Empire. Formerly laws for the government of a colony were chiefly made by English officials and interpreted by English judges, as is still the case in Crown colonies and certain dependencies. But in the great self-governing colonies, the power of making their own local laws has been fully conceded, and, as a necessary corollary to responsible government, the interpretation of those laws is entrusted to colonial judges. We have, thus, within the Empire a number of legislatures promulgating year after year new bodies of statute law, with a separate judicial bench in each province or colony appointed by the colonial executive, interpreting the common and statute law of their colony. In Canada, with the exception of the province of Quebec, the basis of the law is the English common and statute law as it existed at the foundation of the colonies which now form the provinces of the Dominion. From the date of the foundation of each of these colonies statutes passed by the Imperial Parliament, unless otherwise expressed, do not apply to the colonies. It must not, however, be forgotten that, although responsible government has been granted to Canada, that the Imperial Parliament still retains the right to pass laws affecting the Dominion. The Imperial Parliament is, in fact, the supreme legislative body of the Empire. If it were not so the British Empire would not exist. As Macaulay has said, "Very few propositions in politics can be so frequently demonstrated as this—that parliamentary government cannot be carried on by two really equal and independent parliaments in one empire." Legislative power in Canada is therefore subject always to the supremacy of the Imperial Parliament, and, by the British North America Act, is divided between the central and provincial legislatures, the Canadian people being thus subject to no less than three distinct law-making bodies. If a citizen thinks that in legislating on any matter

affecting his rights the Dominion or Provincial legislature has exceeded its jurisdiction, he may challenge the legality of the statute in a court of law; but as regards a statute of the Imperial Parliament, he has no such right. The laws of Canada must therefore be sought in such statutes of the Imperial Parliament as apply to Canada, the statutes of the Dominion and Provincial legislatures, and the common law of England. The last mentioned great body of law was introduced by colonial statutes into the various colonies of Canada; but according to many high authorities this was unnecessary, as Englishmen are supposed to carry the common law of England with them when founding a colony. Canadian law is thus closely akin to the law of England. The profession use the works of English text writers, the judges are guided by the decisions in the English reports, and English statutes applying only to the British Islands are not infrequently adopted by the Dominion or the Provincial legislatures. It is in fact daily becoming a matter of the utmost importance that in all parts of the Empire where English law prevails that the statute law should, so far as local conditions render it possible, be assimilated, and the interpretation of that law by the different courts be as nearly as possible the same. In Canada it has been decided in numerous cases that where the English and Colonial law is substantially the same that decisions of the English Court of Appeal shall be followed. According to a decision of *Dubuc*, J. (*McLenaghan* v. *Hetherington*, 8 M. R., p. 357), where the decisions of courts of sister provinces of Canada are at variance with English decisions, in questions where the law is substantially the same in Imperial and Provincial legislation, the doctrine adopted by the English courts should be followed. In the case of *Trimble* v. *Hill*, 5 App. Cas. 342, Sir *Montague Smith*, in delivering the judgment of the Privy Council, said, at p. 344, "Their lordships think the court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the courts in *England* are bound until a contrary determination has been arrived at by the House of Lords. Their lordships think that in the colonies where a like enactment has been passed by the legislature the Colonial courts should also govern themselves by it." A recent case in Ontario has also brought a valuable expression

of opinion on this subject. *Armour*, C.J., in *Hollender* v. *Ffoulkes*, 26 O. R., at p. 66, is reported thus:

"It is said, however, that we ought to follow the decision of our own Court of Appeal in *Woodruff* v. *McLennan*, 14 A. R. 242, in preference to the decision of the Court of Appeal in England, in *Vadala* v. *Lawes*. I do not, however, see the wisdom or propriety of such a course, although it was adopted in *Macdonald* v. *McDonald*, 11 O. R. 187, and *McDonald* v. *Elliott*, 12 O. R. 98. For the judicial committee of the Privy Council, our highest appellate tribunal, in *Trimble* v. *Hill*, 5 App. Cas. 342, expressed the opinion that as to the matter in controversy, the Colonial courts ought to have followed the judgment of the Court of Appeal in England; and if so as to the matter in controversy in that case, much more ought they to do so in this, involving, as it does, a question of such wise and general interest as the binding effect of a foreign judgment."

Where, however, the English and Colonial law is different, English case law is not binding. In *Woodruff* v. *McLennan*, 14 O. A. R., *Burton*, J.A., now Sir *George Burton*, expressed the opinion that "If the dictum attributed to Sir *Montague Smith*, in the case of *Trimble* v. *Hill*, 5 App. Cas. 342, in the Privy Council, means only that where in a colony an enactment precisely similar to an Act passed by the Imperial Parliament has received a construction by the Court of Appeal in England, that construction should be adopted and acted upon by the courts of the colony until a contrary determination has been arrived at by the House of Lords, I do not think that any exception could be reasonably taken to it; but if it is intended to express the view that an appellate court in a colony is bound under any circumstances to follow a decision of the English Court of Appeal, I must respectfully but decidedly dissent from that view. The very greatest respect is due and should be paid to the decisions of that tribunal, but in performing the function entrusted to us as an appellate court, we are bound, in my opinion, to exercise the right to act upon our own judgment, governing ourselves by the same rules as the judicial committee profess to act upon, viz., 'not to depart from the decision arrived at by the Court of Appeal unless entertaining a clear opinion that the decision arrived at is wrong.'

"Looking at the eminence of the judges at present constituting the Court of Appeal in England, the occasion in which any Colonial court would feel justified in disregarding a judgment of that tribunal must be very rare; but in cases where a clear opinion of its incorrectness is entertained, the suitor is entitled to the independent judgment of the Colonial court."

It will thus be seen that while the Canadian courts recognise the decisions of the House of Lords and Court of Appeal as binding when the decision is upon precisely the same statute, yet when there is a divergence, the English decision is not invariably followed. The Railway and Canal Traffic Act differs somewhat from the Dominion Railway Act, the latter going further in the direction of protection to consignors. But the Supreme Court recognising the distinction, has not followed the English decisions upon the English Act. Upon the question of the authority of English cases where the matter at issue is not based on statute law, reference may be made to the *dicta* of Sir *William Young* in the case of *Dodson* v. *Grand Trunk Rail. Co.*, 2 Geldert & Oxley (N.S.), referred to in the Author's notes at p. 411, and the judgments of Chief Justice *Moss* in *Fitzgerald* v. *Grand Trunk Rail. Co.*, 4 O. A. R. 601, Mr. Justice *Rose* in *Richardson* v. *Canadian Pacific Rail. Co.*, 19 O. R. 369, and *Burton*, J. (now Sir *George Burton*), in *Vogel* v. *Grand Trunk Rail. Co.*, 10 O. A. R. 170.

Recently a new departure has been made in the assimilation of what may be called Imperial law, the chief justice of the Dominion having been appointed a member of the Privy Council. That Sir *Henry Strong* will prove by his judgments the wisdom of such an appointment is undoubted, but the fact is noticeable as making one more step in the direction of an assimilation of English law. The codification of the law relating to the sale of goods and bills of exchange in England has been followed by an almost similar codification of the law in Canada, and it is to be hoped that further efforts will be made to still further bring the laws of England and the laws of Canada into greater uniformity. It is too much to hope for an imperial code, but the common law of England as it exists to day in England and Canada might well be further codified and assimilated.

THE LAW OF BAILMENTS.

PART I.—BAILMENTS GENERALLY.

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SECTION I.

AUTHORITIES.

The principal writers on bailments are :

(1) Chief Justice *Holt*, who gave great consideration to the subject in his celebrated judgment delivered in the case of *Coggs* v. *Bernard* ((1704), Lord Raym. 909). There he describes the different kinds of bailments, and cites as authorities The Civil Law, and Bracton, whom he confesses to be then (now, be it noted, nearly two hundred years ago) "an old author."

(2) Sir *William Jones*, who in the year 1781 published his essay on the Law of Bailments, which, says Judge *Story*, in the preface to his own work, next mentioned, "deserves great praise for its elegant diction, its various research, and its abundant learning," and which he goes so far as to describe in s. 10 as "beautiful"; and which Mr. R. W. Bridgman, in his Short View of Legal Bibliography (1807), at p. 177, extols as "a most perfect specimen of a method of treating law subjects."

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The laws of Canada are, with the exception of the Province of Quebec, the laws of England as they existed at the foundation of the various colonies which now constitute the Dominion, adapted to the requirements of a new community, and subject to any modification subsequently imposed by federal or provincial statute. Blackstone, in his Commentaries (Vol. I. 107), says: "It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being (which are the birthright of every subject), are immediately then in force. But this must be

(3) *Joseph Story*, LL.D., the great American lawyer, who, in 1832, being then Professor of Law in Harvard University, published his Commentaries on the Law of Bailments, with illustrations from the civil and foreign law, the ninth and last edition of which was published as long ago as 1878, under the editorship of Mr. James Schouler, by Little, Brown and Co., of Boston, U.S.A., and it is to this edition that I shall refer, unless any other edition is particularly mentioned.

(4) *Isaac Edwards*, LL.D., another learned American author, who, in 1855, published his treatise on the law of bailments. The third edition of his work, by Edwin Baylies, was published in 1893 by Banks and Brothers, New York, and Albany, N.Y.

SECTION II.

DERIVATION AND DEFINITION OF TERMS.

(a) Derivation of the word Bailment.

In the Law-French Dictionary, collected out of the best authors by "F. O.," 1701, will be found:

"*Bailer*, to commit, deliver, or pawn."

According to *Blackstone*, "bailment" is derived from the French *bailler*—to deliver (see 2 Bla. Com. p. 451).

In Kelham's Norman Law Dictionary, 1779, is found:

"*Bailler*, to let forth, to lend, to deliver."

From the above it will be seen that the leading ideas involved in the word bailment are those of "to commit, deliver, lend, pawn, and let." *Story* says the term bailment is derived from the French word *bailler*, which signifies to deliver, and that it is a compendious word to signify a contract resulting from delivery (Story, s. 2).

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understood with very many and very great restrictions; they carry with them only so much of the English law as is applicable to their own situation and the condition of the infant colony."

Lord *Mansfield*, in the case of *Lindo* v. *Lord Rodney*, reported in note 1 to the case of *Le Caux* v. *Eden*, Doug. 594, says: "The colonists take all the common and statute law of England applicable to their situation and condition." To what extent these laws prevail in colonies settled by Englishmen is a question which has occasioned much discussion, without producing any rule approaching precision for our guidance. Neither is the

(b) Definitions in General and Legal Definitions in Particular.

Mr. *Mill*, in the introduction to his system of Logic, says that the definition we set out with is seldom that which a more extensive knowledge of the subject shows to be most appropriate. "So long," he adds, "as the sciences are imperfect, the definitions must partake of their imperfection; and if the former are progressive, the latter ought to be so too. As much, therefore, as is to be expected from a definition placed at the commencement of a subject is that it should define the scope of our inquiries." Again, in his chapter "Of Definition," he says, "the main purpose of scientific definitions is to serve as the landmarks of scientific classification."

Lord Justice *Lindley*, in his treatise on the Law of Partnership (5th edit., p. 1), says that "to frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition. Other persons have to take the law as they find it; and rarely indeed is it in their power to frame any definition to which exception may not justly be taken. All that they can usefully attempt is to analyse the meanings of the words they use, and to take care not to employ the same word in different senses, where so to do can possibly lead to confusion." And this eminent judge, without attempting to *define* the terms "partners" and "partnership," thinks it sufficient to point out as accurately as possible the *leading ideas* involved in those words.

In jure omnis definitio periculosa est.

The difficulty and danger of attempting legal definitions are well known to legislators and to every one who has put the definitions of the ablest writers to the test, or has himself attempted to draft a definition. Law is so mutable that there can be no finality in its definitions.

"Except in mathematics, it is difficult to frame exhaustive definitions of words; they must be construed with reference to

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difficulty removed by the fact that several of the provinces (previous to the British North America Act), enacted by colonial statute that such laws should be in force. In Ontario, for instance, where the first act of the old legislature of Upper Canada (now Ontario) was to make the law of England, as it stood in the fourteenth year of the reign of Geo. III., the rule of decision in all questions of property and civil rights, the exception was made in respect to ecclesiastical rights and dues, the poor laws and the laws of bankruptcy. And since the Ontario courts have frequently determined that particular English statutes, which either were provided for local purposes or were not applicable in their provisions to the circumstances of the colony, were not in force, they have

the subject-matter to which they are applied" (*Wakefield Local Board* v. *Lee* (1876), 1 Ex. D. 336, at p. 343: *Grove*, J.).

"Definitions are most difficult" (*Thames and Mersey Marine Insurance Co.* v. *Hamilton Fraser and Co.* (1887), 12 App. Cas. 484, at p. 492: Lord *Bramwell*).

Statutory Definitions.

Parliament renders legal terms equivocal by its differing definitions of them. Occasionally it makes the same word bear slightly different meanings in the same Act, *e.g.*, The Merchant Shipping Act, 1894, Part VII., which confines certain definitions to that part of the Act only, and the Sale of Goods Act, 1893, Part I., s. 2, which confines a definition to that section of the Act only.

Any multiplication of statutory definitions where they differ from, or tend to disturb, the ordinary significations, is much to be deprecated. Such an expedient, for brevity's sake alone, should be avoided as far as possible.

"It is obvious, of course, to any lawyer that one of the difficulties in interpreting an Act of this kind (Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122)) arises from the fact that Parliament has seized hold of the term 'owner' as a convenient term to use, and there applied it by means of a definition, and the difficulty arises from this definition not being so clear as to be free from all ambiguity" (*Fillingham* v. *Wood*, [1891] 1 Ch. 51, at p. 56: *Chitty*, J.).

It is important and interesting to note how, from time to time, the word "bailment" has been defined. I, therefore, now give its definitions in chronological order, and it will be found that, notwithstanding their several and respective differences and imperfections, they collectively point out the leading ideas of bailment, and are sufficient for all practical purposes.

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by such decisions placed the law of the Province of Ontario on very much the same footing as it would have stood if the English law had never been formally introduced. In *Reynolds* v. *Vaughan*, 1 B. C. Rep. 3, it was said, by *Bigbie*, C.J., that "An Englishman going to found a colony may be supposed to know the common law, by common sense, and to carry the statutes (in the form of Chitty) in his hands. But Orders in Council are something *extra*, and do not apply either *proprio vigore* or by the help of the English Law Ordinance, 1867, which establishes in British Columbia 'the civil and criminal laws of England as the same existed on the 19th November, 1858.' I think those words mean common and statute law, and not Orders in Council, although issued under the authority of an Act of Parliament."

(c) Some Definitions of the word Bailment.

Mr. Justice *Blackstone*, in his Commentaries on the Laws of England, Vol. II., p. 396, alludes to "*bailment*, or delivery of goods to another person for a particular use"; and at p. 451 of the same volume, says: "*Bailment* is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee." (1)

Sir *William Jones*, in his Essay on the Law of Bailments (4th edit., 1833), at pp. 1, 117 respectively, gives the two following, and slightly varying, definitions:

"Bailment or a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered" (p. 1).

"Bailment is a delivery of goods in trust, on a contract, expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed" (p. 117).

Sir *Henry Gwillim* gives the latter paragraph in Bacon's Abridgment.

It is to be observed that neither of the above definitions given by Sir *William Jones* includes a bailment to a factor, and in his second definition the notion of a trust is introduced. Lord *Holt* includes factors in his fifth sort of bailments, as will be hereafter seen.

Story, in his Commentaries on the Law of Bailments (s. 2), considers that "it may be said that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust."

It will be noticed that every authority above cited uses the expression "in trust." Now this expression is clearly not intended to have the same meaning as it has when *technically* used in connection with real property. When used in relation to bailments it is intended to express a confidence reposed by the bailor in the bailee, or a reliance on the character, integrity, worth, honesty, or credit, as the case may require, of the bailee, in the *general* acceptation of those terms. That this is so I need only quote the following passage:

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(1) A solicitor receiving a note from his client for collection, is bound to collect or return it, or account for its loss on grounds relieving him from blame, otherwise he is accountable for the loss of the note and for all damages resulting therefrom (*Gould* v. *Blanchard*, 29 N. S. L. R. 361).

"A technical *trust*, indeed, created by the limitation of a second use, was forced into the courts of equity in the manner formerly mentioned (Book II., ch. 20); and this *species of trust*, extended by inference and construction, have ever since remained as a kind of *peculium* in those courts. But there are other trusts which are cognisable in a court of law, as deposits and all manner of bailments" (3 Bla. Com. 431, 432).

Sir *James Stephen*, in his Digest of the Criminal Law, 3rd edit., at p. 215, defines bailment as follows:

"Where one person delivers, or causes to be delivered, to another any moveable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made, shall be delivered either to the person making the delivery or to some other person appointed by him to receive it; the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee." (2)

The above appears to be a mere declaration of the facts which the name "bailment" involves in its signification. From the varying definitions given above, it may be gathered that the chief characteristic of a bailment is the *intrusting* of a chattel by a person called the bailor to another person called the bailee for some purpose upon a *contract, express or implied*. It is necessary, therefore, to have a clear notion of what a contract, express or implied, is.

(d) Definition of a Contract.

A contract is an agreement which the law will enforce, made upon sufficient consideration or with certain solemnities, by which something is willed to be done or forborne by one of the parties, such will being communicated to the other of the parties by some act engaging to carry it into effect. In support of this definition, the following quotations will suffice:

1. "A contract, according to the well-known definition of Sir *William Blackstone* (2 Bla. Com. 442), is an agreement upon

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(2) The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat. *Held*, this was a bailment (*In re Williams*, 31 U. C. Q. B. 143).

sufficient consideration to do or not to do a particular act. According to this definition it is an agreement. Now, in order to constitute an agreement or contract, two things are requisite—first, the will, and, secondly, some act, whether in word or deed, whereby that will is communicated to the other party. No man has entered into an agreement or contract to do, or not to do, some particular thing unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect. When both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted. Now this is not a mere theoretical disquisition, but a statement of sound practical principles of universal law, and of the law of England in particular" (*Haynes* v. *Haynes* (1861), 1 Drew. & Sm. 426, at p. 433: *Kindersley*, V.-C.).

2. "I understand by a contract an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration, or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise readily explained" (*Alderson* v. *Maddison* (1880), 5 Ex. D. 293, at pp. 297, 298: *Stephen*, J.).

(e) Definition of an Express Contract.

An *express* contract may be in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, and "it should be borne in mind that a written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract" (*Wake* v. *Harrop* (1861), 6 H. & N. 768, at pp. 774, 775: *Bramwell*, B.). (3)

Canadian Cases.

(3) Where a proposal is made in writing by one party and accepted, *ad idem*, by the other, either verbally or by acting upon it, the contract is a written one (*per Burton*, J.A., 10, O. A. R. 226).

If the legal part of a contract can be severed from that which is illegal, the former shall stand good, whether the illegality exist by statute or common law (*per Osler*, J.: *Kitching* v. *Hicks*, 6 O. R. 639).

(f) Definition of an Implied Contract.

An *implied* contract is founded on the presumed intention of the parties, "gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words; and the law, therefore, implies from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials" (Addison on Contracts, 7th edit., p. 21). See also Chitty on Contracts, Chap. III., where numerous examples of implied promises are given.

In this connection the following quotations are valuable:

1. "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him" (*Morgan* v. *Ravey* (1861), 6 H. & N. 265, at p. 276: *Pollock*, C.B.). (4)

2. "No court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties" (*Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, at p. 212: Lord *Esher*, M.R.).

3. "I agree with the rule as laid down by the Master of the Rolls (Lord *Esher*), viz., that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle" (*Hamlyn and Co.* v. *Wood and Co.*, [1891] 2 Q. B. 488, at p. 494: *Kay*, L.J.).

(g) Difference between an Express and an Implied Contract.

1. "I cannot think there can be any difference as to the consequences resulting from a breach of contract by reason of that contract being either express or implied. The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual

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Canadian Cases.

(4) Where there is evidence of a loan or debt, a promise to repay it will be implied (*Hall* v. *Morley*, 8 Q. B. 584).

Other instances of implied contract will be found in the cases of *Yates* v. *Law*, 25 U. C. Q. B. 562; *Papps* v. *Melville*, 16 U. C. Q. B. 124.

agreement ; an implied contract by circumstances and the general course of dealing between the parties ; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same whether it be proved by direct or circumstantial evidence" (*Marzetti* v. *Williams* (1830), 1 B. & Ad. 415, at p. 423 : Lord *Tenterden*, C.J.).

2. "The only difference, however, between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same" (*ibid.*, at p. 425 : *Parke*, J.).

(h) Parties to a Contract of Bailment.

The capacity to be parties to a bailment is regulated by the general law concerning capacity to contract. For instance, an infant cannot contract, except for necessaries, and therefore, for want of capacity to contract, he cannot be a party to a bailment, unless it is a necessary. However, if he were to conceal his want of capacity and fraudulently to receive goods, he might be liable, as the following case shows :

"But in this case, for want of a capacity in the defendant to make a complete contract [that of infancy] no bailment was made. This being the case, the action is brought in *detinue* instead of trover. Now, there can be no doubt that trover might have been brought on the conversion. For the reasons already stated, I do not see how the goods could be in the defendant's hands under what the law calls a bailment. He first fraudulently received them, concealing the circumstances of his minority, and then fraudulently set up his minority as a defence against the plaintiff's just demand. The goods being wrongfully in the defendant's hands from the beginning, without any valid contract between him and the plaintiff, it seems to me that they must be considered in the same situation as if the defendant had at first wrongfully gotten possession of them without pretence of bailment" (*Mills* v. *Graham* (1804), 1 Bos. & P. (N.R.) 140, at p. 145 : Sir *James Mansfield*, C.J.). (5)

Canadian Cases.

(5) "The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury till he is of legal capacity to bind himself as an adult. When he arrives at majority he is clothed with full legal capacity, with all its incidents ; and, as an adult, has no special protection on the ground of ignorance of the law, and any disaffirmance by him of a deed executed during minority should only be given

The next case shows that an infant who has paid for something which he has consumed or used, cannot recover the money which he paid. In *Valentini* v. *Canali* ((1889), 24 Q. B. D. 166) the plaintiff, an infant, claimed the return of 68*l.*, which he had paid under a void contract, by which he agreed with the defendant to become tenant of a house and to pay 102*l.* for the furniture. The plaintiff had occupied the house and used the furniture. The contract was set aside, the Divisional Court (*Coleridge*, C.J., and *Bowen*, J.) holding that when an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money he has paid. See also the Infants Relief Act, 1874 (37 & 38 Vict. c. 62). (6)

(i) Special Terms imposed by Bailee.

"In the contract of bailment, the bailee may impose whatever terms he chooses, if he gives notice to the bailor that there are special terms and the means of knowing what those terms are; and if the bailor chooses to make the bailment he is bound by them. In *Wyld* v. *Pickford* (1841), 8 M. & W. 443, which was an action against a carrier for non-delivery of goods, the defendants pleaded a condition for exemption from liability and knowledge in the plaintiff, but no assent; and, on special demurrer, that the plea showed evidence of contract, and not a contract, *Parke*, B., gives judgment for the defendant, saying (p. 458), that 'if the plaintiff sues on a bailment to the defendants on the special terms, it must be a bailment on the terms on which alone the defendants (the bailees) have agreed to accept the goods'" (*Van Toll* v. *The South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 75, at p. 84: *Erle*, C.J.).

(k) Agency and Ratification.

"To entitle a person to sue upon a contract it must clearly be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him" (*Watson* v. *Swann* (1862), 11 C. B. (N.S.) 756, at p. 771: *Willes*, J.). (7)

Canadian Cases.

effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority" (*per Boyd*, C.: *Foley* v. *Canada Permanent Loan and Savings Co.*, 4 O. R. 38).

(6) R. S. O. c. 146.

(7) Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was

"I conceive that, in all the various sorts of bailment, when a question arises as to the liability of the bailee for the loss of the thing bailed, it is to be determined by the degree of care required from the bailee, and the degree of negligence from which the loss arose; and that the question is not whether the negligence is imputed personally to the bailee or to his servants, within the scope of their employment" (*Dansey* v. *Richardson* (1854), 3 E. & B. 144, at p. 168: Lord *Campbell*, C.J.).

SECTION III.

DEGREES OF CARE AND NEGLECT.

(a) In the Popular Sense.

It is necessary, perhaps, to point out that the various degrees of care and neglect, as commonly understood, are not quite the same as the various degrees of care and neglect as legally understood. In ordinary conversation we speak of the *slight* care, the *ordinary* care, or the *great* care of an article. The word ordinary, however, in its popular sense is equivocal. One of its meanings, as applied to care, is inferior care or care of little worth; another meaning is that of customary or usual care. The care ordinarily bestowed on the safe keeping of an article varies very much according to circumstances. The care ordinarily bestowed on articles of great value is proportionately great, while the care ordinarily bestowed on articles of small value is proportionately small. The care ordinarily bestowed on the safe keeping of an article varies very much according to its liability to loss or injury; where the liability to loss or injury is small, the care ordinarily bestowed on its safe keeping is slight; but where the liability to loss or injury is great, the care ordinarily bestowed on its safe keeping is great. Again, where the liability to loss or injury is neither small nor great, but intermediate between small and great, the care ordinarily bestowed ranges between small and great.

No fixed and definite meaning can, therefore, possibly be given to the phrase "ordinary care" in its popular sense. It is clearly a relative and not an absolute term.

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indebted to him for advances which he had previously made. *Held*, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club (*Simms* v. *Denison*, 28 U. C. Q. B. 323). See *post*, p. 91.

In theory, no doubt, there must be two extremes of care and a mean or medial care, or, as Sir *William Jones* puts it (p. 5), "There are infinite shades of care or diligence, from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude; but," he adds, "extremes in this case, as in most others, are inapplicable to practice." If so, and there is, I think, no doubt about it, an exact or absolute mean between such extremes is also impossible in practice.

With regard to degrees of neglect, as ordinarily understood in ordinary conversation, we make use of the phrases "*slight* neglect" and "*great* neglect," but never of the phrase "*ordinary* neglect," in respect of an article worth keeping safely. A valuable article cannot well be said to be *ordinarily* neglected, and as *ordinary care* is taken of an article of but small value, so even it can scarcely be said to be ordinarily neglected.

In theory, doubtless, there are two extremes of neglect and a mean or medial neglect, or, as Sir *William Jones* says (p. 7), "There are infinite shades of *default* or *neglect*, from the slightest inattention or momentary absence of mind to the most reprehensible supineness and stupidity." But he does not add, as he did with regard to extremes of care, "extremes in this case, as in most others, are inapplicable to practice." An exact or absolute mean between such extremes is clearly impossible in practice.

Logically, where only *slight* care is called for, it is clear that all care, save slight care, may be dispensed with, and there will be neglect only if less than slight care is taken. Now, neglect of *slight* care approximates to want of all care, and such neglect may well be termed *gross*. The omission of slight care and the commission of gross negligence may, therefore, be said to be correlative.

Where *great* care is called for, it is clear there is but little room for any neglect whatever, so that *slight neglect* may cause *great care* to cease. The omission of great care and the commission of slight neglect may, therefore, be said to be correlative. It should not, however, be forgotten that it is not slight neglect only that causes great care to cease, for if slight neglect would do so *à fortiori* any neglect greater than slight would do so.

As no fixed or definite meaning can be given to the phrase "ordinary care," so no fixed or definite meaning can be given to any phrase which expresses the want of it. The want of ordinary care is not an ordinary thing, and the expression "ordinary neglect" would not, in its popular sense, be at all an apposite expression to use to express want of ordinary care.

As commonly understood, the terms "slight neglect" and "great neglect" are merely relative and not absolute terms, and no definite meaning can be given to them.

The three degrees or classes of care and of negligence are in practice quite as indefinite as the three classes of society, viz., the higher classes, the middle classes, and the lower classes, which are not the same in any two countries. Yet, in any particular country it is rarely difficult to assign a particular individual to one or other of such classes.

Having made the above remarks on the degrees of care and neglect in the popular sense, I will deal with the same degrees of care and neglect in the legal sense.

(b) In the Legal Sense.

The terms *slight* care, *ordinary* care, and *great* care, and *slight* neglect, *ordinary* neglect, and *gross* neglect, are all used in law, and have legal meanings assigned to them which differ from their popular meanings. The meanings of such *terms when applied in law to bailments depend, first, upon the nature of the bailments* ; and, secondly, upon the surrounding circumstances. These legal or technical terms should be explained by the judge to the jury, otherwise they are sure to give them their popular meanings. It will be for the jury to determine whether, in point of fact, a person has been guilty of any particular legal neglect.

As the text writers of authority and the courts do not seem to be at one as to the use and meaning of the various expressions denoting the various degrees of care and neglect, I now set out the definitions given by text writers, and they are as follows :—

(c) Definitions of Text Writers.

Ordinary Diligence or Care.

Sir *William Jones* (p. 6) : *Ordinary* diligence is the care which the *generality* of *rational* men use in the conduct of their own affairs, or which every person of *common prudence*, and capable of governing a family, takes of his own concerns.

Story (s. 11) : *Common* or *ordinary* diligence is that degree of diligence which men *in general* exert in respect to their own concerns. It may be said to be the *common prudence* which men of business and heads of families usually exhibit in affairs which are interesting to them.

Slight Diligence or Care.

Sir *William Jones* (pp. 6, 8) : *Slight* diligence is a degree of care less than ordinary, *i.e.*, that care which every man of *common sense*,

though absent and inattentive, applies to his own affairs or takes of his own possessions.

Story (s. 16): *Low* or *slight* diligence is that which persons of *less than common prudence*, or, indeed, of *any prudence at all*, take of their own concerns; or the diligence which men habitually careless or *of little prudence* (not "however inattentive" they may be) generally take in their own concerns. And in s. 87 he says, "The least degree of care known to our law, that is, slight diligence."

Great Diligence or Care.

Sir *William Jones* (pp. 6, 8): *Great* diligence is a degree of care greater than ordinary, *i.e.*, that attention which a man *remarkably exact and thoughtful* gives to the securing of his personal property, or such care as a *very cautious and vigilant* man takes of his own possessions.

Story (s. 16): A *high* or *great* diligence is, of course, extraordinary diligence, or that which *very prudent* persons take of their own concerns.

According, therefore, to these able text writers, *ordinary* diligence or care is really common prudence; *slight* diligence or care is less than common prudence, and *great* diligence or care is greater than common prudence. In fact, their definitions do little more than substitute the word "prudence" for the word "care."

Of the definition of *ordinary diligence, care, or prudence* let us take an illustration or two. Speaking generally, a rational man, or one of common prudence, does not use the same amount of care in all his own affairs: *e.g.*, at a hotel he takes very different care of his valuables from what he takes of his boots, though he usually takes ordinary care of both; in fact, he would take great care of the former and slight care of the latter. Hence, in the case in question, it appears that slight care is not less than ordinary care, so far as the boots are concerned, but it is merely ordinary care; and great care is not greater than ordinary care, so far as the valuables are concerned, but merely ordinary care.

With all due submission, it appears to me that none of the above legal definitions are very helpful.

I do not think that Sir *William Jones* was himself quite satisfied with the phrase "*ordinary* care," for he says (p. 6), "The fixed mode or standard of diligence I shall, for want of an apter epithet, invariably call *ordinary*; although that word is equivocal, and sometimes involves a notion of degradation which I mean wholly to exclude." *Story* says (s. 11), "Indeed, what is common or

ordinary diligence is more a matter of fact than of law." The word "reasonable," I would submit, is not open to the same objections as the word "ordinary." The former word is much used in law, in such phrases as "reasonable cause," "reasonable conditions," "reasonable construction," "reasonable damages," "reasonable excuse," "reasonable expectation," "reasonable notice," "reasonable price," "reasonable time." The reasonableness of the care called for will in every case depend upon circumstances.

I will now pass to the definitions given by text writers of the degrees of neglect.

Slight Neglect.

Sir *William Jones* gives the two following definitions :

Slight neglect, *levissima culpa*, is the omission of that care which *very attentive and vigilant persons take of their own goods*, or, in other words, of *very exact diligence* (p. 22).

Slight neglect is the omission of that *diligence* which *very circumspect and thoughtful persons* use in securing *their own* goods and chattels (p. 118).

Story (s. 17) : *Slight* negligence is the want of great diligence.

Sir *William Jones's* definitions really amount to saying that slight neglect is the omission of great diligence, as defined by him at pp. 6, 8 (see *ante*, p. 15).

Gross Neglect.

Sir *William Jones* gives the two following definitions :

Gross neglect, *lata culpa*, or, as the Roman lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *dolus*, or *fraud* itself ; and consists, according to the best interpreters, in the *omission* of that care *which even inattentive and thoughtless men never fail to take of their own property*. This fault they justly hold a violation of *good faith* (pp. 21, 22).

Gross neglect is the *want* of that *care* which *every man of common sense, how inattentive soever*, takes of his own property (p. 118).

Story (s. 17) : *Gross* negligence is the want of *slight* diligence.

Sir *William Jones's* definitions really amount to saying that gross neglect is the omission of slight diligence, and, therefore, agree with that of *Story*.

Ordinary Neglect.

Sir *William Jones* gives the two following definitions:

Ordinary neglect, *levis culpa*, is the *want* of that diligence which the *generality of mankind use in their own concerns*, that is, of *ordinary care* (p. 22).

Ordinary neglect is the *omission* of that *care* which *every man of common prudence and capable of governing a family* takes of *his own* concerns (p. 118).

Story (s. 17): *Ordinary* negligence may be defined to be the want of *ordinary* diligence.

Sir *William Jones* in his first definition states ordinary neglect to be the want of *ordinary* care; though to be consistent with his definition of ordinary diligence (at p. 6) he should have qualified the word "mankind" by the phrase "the rational part of." It is curious to note how Sir *William Jones* changes his phraseology in these various definitions.

If the above definitions are adhered to, confusion is, I think, likely to continue. The phrase "ordinary neglect" is, I think, a highly artificial and misleading one, used, be it noted, by *Holt*, C.J., in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at p. 915, as synonymous with "common neglect" at p. 913.

The words "ordinary neglect" were used by Sir *William Jones* to describe a constant or fixed mode of default for want of a more apposite word. Now, there is no such thing either in theory or in practice as a constant or fixed mode of default. The phrase "ordinary neglect" to any juryman, not a lawyer, would signify a common or usual neglect, like that of ladies who pin their watches outside their dresses. I would suggest that the correlative term to "*ordinary* care" should be "*actionable* neglect." The phrase "actionable negligence" is used by Lord *Selborne*, in *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419, at p. 423. The better course, perhaps, would be to substitute "reasonable care" for "ordinary care," and "actionable neglect" for "ordinary neglect."

At p. 30, Sir *William Jones* gives as the substance of Pothier's answer to Le Brun's reproof of the triple division of neglects the following passage:

"That he can discover no kind of absurdity in the usual division of *neglect* and *diligence*, nor in the *rule* by which different *degrees* of them are applied to different contracts; that, to speak with strict propriety, negligence is not *permitted* in any contract, but *a less rigorous construction* prevails in some than in others."

Story (s. 17) refers to the above observation, and adds, "The law considers diligence to be, in some sort, a relative term; and it

must be judged of from *the nature of the bailment, and from all the other ingredients which may fairly be presumed to enter into the contemplation of the parties.* He who asks a favour has no right to expect to be absolved from a proportionate care; and he who accepts a burden has a right to presume that he will be required to be as scrupulously exact as if he received a benefit."

I now proceed to give the judicial definitions of, and statements regarding the legal degrees of care and neglect.

(d) Judicial Definitions of "Negligence" and "Gross Negligence."

By law, a *reasonable* amount of care is expected from all bailees; but what is a reasonable amount of care depends chiefly upon the *nature of the bailment.* A broad distinction is made in this respect between *gratuitous* bailments and bailments *for reward.*

From a *gratuitous* bailee is *reasonably* expected only such care as he would use in his own affairs, and such skill as he happens to possess. Should he omit to exercise such care—which is but slight—he is legally and technically guilty of what is called *gross* negligence, apparently because he does not exercise such care as can be little or no trouble to him to exercise.

On the other hand, from a bailee *for reward* is *reasonably* expected such care and diligence as should be exercised in the ordinary and proper course of a similar business, and such skill as he ought to have in the business for which he is paid. Should he omit to exercise such care, and *thereby cause a loss or injury* to the thing bailed, he is liable to an action, whether such neglect and default is but slight or great or intermediate between slight and great. (8)

Negligence.

In general, the legal care to be taken is usually that which a man of ordinary prudence and skill would take; though in some cases a greater degree of care and skill is exacted than in others.

In general, legal negligence is the omitting to do that which a man of ordinary prudence and skill would do, or doing that

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Canadian Cases.

(8) Where an attorney received money to invest in real estate security. *Held*, that he was liable for the want of reasonable care as regarded the value of the security, and that his responsibility was not confined to the examination of title (*Peters* v. *Weller*, 30 U. C. Q. B. 4).

which a man of ordinary prudence and skill would not do, whereby a loss or injury results to the thing bailed. (9)

The above propositions are to be gathered from the following excerpts :—

1. **Ordinary prudence.**—"Though it has been urged that the care which a prudent man would take, is not an intelligible proposition

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(9) The defendants received a cheque from the plaintiff to present and collect it from the bank on which it was drawn. On presentment, payment was refused by the bank, who retained the cheque, alleging that the names of the drawers were forged. *Held*, on demurrer, that if the cheque was forged the detention was rightful, and, if genuine, defendant lost control over it by no wrongful act, and plaintiff's remedy was against the bank. *Per Robinson*, C.J. : "There is nothing in the record in this case to show that the defendants received the cheque from the plaintiff upon any bailment that would make them responsible for it under all circumstances, except in the case of its loss or destruction by the act of God or the king's enemies. The declaration is in the common form of a declaration *in detinue*, and the defendants plead that the cheque was given to them by the plaintiff for the purpose of its being presented by them to the person on whom it was drawn and collecting the money upon it. That, for all that appears, was a contract of an ordinary character, requiring no more care than a provident person would have taken of the cheque under like circumstances, if it had been drawn in his own favour and he had gone to present it" (*Brown* v. *Livingstone*, 21 U. C. Q. B. 439).

Plaintiff entrusted 500 dols. to defendant, who signed a receipt, stating that it was to be lent, with 300 dols. of his own, to one H., "being secured on the said H.'s storehouses," and in defendant's name, and bearing interest at nine per cent., payable to defendant, who would, on receipt of the interest, pay to the plaintiff her interest, 45 dols. per year ; and, at the expiration of two years, defendant to pay over to plaintiff both principal and interest ; but defendant not to be responsible for the money, except as paid by H. to him. The declaration alleged that defendant promised to invest the money on the security of a mortgage on the storehouses, and defendant admitted that this was the agreement. It was argued that he was a gratuitous bailee only, and not shown to have been guilty of negligence. *Held*, that it was a case of contract founded upon good consideration : the entrusting him with the money, and that, having broken it, he was liable. *Per Harrison*, C.J. : "If this was a case of simple deposit of money for safe keeping, the obligation would be no more than to keep the thing deposited with reasonable care. In such a case, the negligence for which the bailee is responsible is the want of that ordinary diligence which a reasonably prudent man would take of his own property of the like description. The principle, well recognised by the laws of England, is, that men who make promises, founded on good consideration, shall perform their promises, or be held liable in damages for breach" (*Holmes* v. *Thompson*, 38 U. C. C. P. 292). See *post*, p. 56.

Where a person entrusted with money to invest on real estate, invests it on a second mortgage, it was held to be a breach of duty (*Carter* v. *Hatch*, 31 C. P. 293).

as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard* ((1704), 2 Ld. Raym. 909). Though in some cases a greater degree of care is exacted than in others . . . the care taken by a *prudent man* has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary *prudence* would observe" (*Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, at p. 475: *Tindall*, C.J.).

2. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Ex. 781, at p. 784: *Alderson*, B.).

3. "Negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances" (*Bridges* v. *Directors, etc. of North London Rail. Co.* (1874), L. R. 7 H. L. 213, at p. 232: *Brett*, J.).

Gross Negligence.

Gross negligence is the *legal* term used to express the negligence for which a *gratuitous* bailee is responsible.

Gross negligence has also a popular meaning, viz., great negligence to which every one attaches great blame. In this sense it is a relative term.

At law, gross negligence and fraud are not convertible terms. The former may be evidence of the latter, and may also be almost undistinguishable from it.

The legal and popular meanings of the term gross negligence seem to have been confused in some cases. A perusal of the following judicial statements respecting the term—given in chronological order—will help to show what the direction of the judge when leaving a question of gross negligence to the jury should be, and the history of the expression may be traced in such statements.

Judicial Statements respecting Gross Negligence.

1. **Explanation to jury.**—"I am of opinion that the jury should have had some explanation of what is meant by *gross negligence*. Without some explanation, they would think that it means conduct highly blameable. Yet something much short of that sort of conduct will be sufficient to make a carrier responsible. He and his servants must take all the care that is necessary for the preservation of the property committed to his charge. They must take the same care of it that a prudent man would take of his own property. This is the law with respect to all bailees for hire or reward" (*Batson* v. *Donovan* (1820), 4 Barn. & Ald. 21, at p. 30 : *Best*, J.).

2. "I therefore thought this a case of gross negligence; but I did not leave it to the jury as a case of gross negligence, without explaining to them what gross negligence was, and I explained it to them in the very words of my Brother *Best*, who observed that such an explanation had been omitted by my Brother *Bayley*, in *Batson* v. *Donovan* (1820), 4 Barn. & Ald. 21" (*Duff* v. *Budd* (1822), 3 Brod. & Bing. 177, at pp. 182, 183 : *Dallas*, C.J.).

3. **Question of law or fact.**—"A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly, and alleges that, from his failure so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury" (*Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at pp. 260, 261 : *Taunton*, J.).

4. **Definition of gross negligence.**—"The phrase '*gross negligence*' means nothing more than a great and aggravated degree of

negligence, as distinguished from negligence of a lower degree" (*id.*, at pp. 261, 262).

5. "In many other cases it is said, he is still responsible for 'gross negligence'; but in some of them that term has been defined in such a way as to mean ordinary negligence (Story on Bailments, s. 11), that is, the want of such care as a prudent man would take of his own property. *Best*, J., in *Batson* v. *Donovan* [(1820), 4 B. & Ald. 21]; and *Dallas*, C.J., in *Duff* v. *Dodd*, [*sic.* qu. "*Budd*"] [(1822), 3 Brod. & Bing. 177]" (*Wyld* v. *Pickford* (1841), 8 M. & W. 443, at pp. 460, 461: *Parke*, B., delivering the judgment of the court).

6. **Difference between "gross negligence" and negligence.**—"Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists" (*Hinton* v. *Dibbin* (1842), 2 Q. B. (N.S.) 646, at p. 661: Lord *Denman*, C.J., delivering the judgment of the court (Lord *Denman*, C.J., *Williams*, *Coleridge*, and *Wightman*, JJ.)).

7. "I said I could see no difference between *negligence* and *gross* negligence—that it was the same thing, with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence" (*Wilson* v. *Brett* (1843), 11 M. & W. 113, pp. 115, 116: *Rolfe*, B.).

8. "The term *gross negligence* is found in many of the reported cases on this subject; and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is responsible, and have been somewhat loosely used with reference to carriers for hire: and in *Hinton* v. *Dibbin* ((1842), 2 Q. B. 646), a case depending on the Carriers Act (11 Geo. 4 and 1 Will. 4, c. 68), Lord *Denman*, in giving judgment, observed, with much truth: 'It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists'" (*Austin* v. *The Manchester, etc. Rail. Co.* (1852), 10 C. B. 454, at pp. 474, 475: *Cresswell*, J., delivering the judgment of the court).

9. **Gross negligence is greater negligence than the absence of ordinary care.**—"If they (the jury) were told to understand by

gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable ; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*" (*Cashill* v. *Wright* (1856), 6 El. & Bl. 891, at p. 899 : *Erle*, J.).

Note.—As to gross negligence and fraud not generally being convertible terms, see (*e*), *post*, p. 26.

10. **Strict line of demarcation.**—"There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them" (*Beal* v. *South Devon Rail. Co.* (1860), 5 H & N. 875, at p. 881 : *Pollock*, C.B.).

11. **Failure to exercise reasonable care, skill, and diligence is gross negligence.**—"In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants. It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron [*Pollock*] in the court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'

"The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment" (*Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, at pp. 341, 342 : *Crompton*, J., delivering the judgment of the Exchequer Chamber (*Cockburn*, C.J., *Wightman*, *Crompton*, *Willes*, *Byles*, and *Keating*, JJ.)).

12. **Gross negligence is the absence of such care as it was the duty of the defendant to use.**—"I quite agree with the *dictum* of *Lord Cranworth* [then Baron *Rolfe*] in *Wilson* v. *Brett*

((1843), 11 M. & W. 113), that gross negligence is ordinary negligence *with a vituperative epithet* (*ante*, p. 22), a view held by the Exchequer Chamber: *Beal* v. *South Deron Rail. Co.* ((1864), 3 H. & C. 337). Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description and not a definition, and it would have been only introducing a source of confusion to use the expression gross negligence instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice (Sir *William Erle*) in his summing up" (*Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, at p. 612: *Willes*, J.).

13. "Next it is objected that he (Sir *William Erle*) ought to have left the question whether there was *gross* negligence. I do not see what more he could have said, except it was to use the very word 'gross'; but it certainly would not have enlightened the jury to use an indefinite word without explaining it, and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence" (*ibid.*, at p. 614: *Montague Smith*, J.).

14. "Any negligence is *gross* in one who undertakes a duty and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses" (*Lord* v. *Midland Rail. Co.* (1867), L. R. 2 C. P. 339, at p. 344: *Willes*, J.).

I conclude these judicial statements with that of Lord *Chelmsford*, where the history of the term gross negligence from the year 1704 will be found. Some of the foregoing judicial *dicta* are repeated, commented on, and criticised by his lordship, who approves of the retention of the term "gross negligence" as descriptive of the difference between the degrees of negligence for which different classes of bailees are responsible.

15. "From the time of Lord *Holt's* celebrated judgment in *Coggs* v. *Bernard* ((1704), Ld. Raym. 909), in which he classified

and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.' This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last Lord *Cranworth* (then Baron *Rolfe*), in the case of *Wilson* v. *Brett* ((1843), 11 M. & W. 113), objected to it, saying that he 'could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet' (*ante*, p. 22), and this critical observation has been since approved of by other eminent judges.

"Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord *Holt*, and Sir *William Jones* in his essay on the Law of Bailments.

"In the case of *Grill* v. *General Iron Screw Collier Co.* ((1866), L. R. 1 C. P. 612), Mr. Justice *Willes*, after agreeing with the *dictum* of Lord *Cranworth*, and stating that the same view of the term 'gross negligence' was held by the Exchequer Chamber in *Beal* v. *South Devon Rail. Co.* ((1864), 3 H. & C. 337), said (see *ante*, p. 24), 'Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use.' It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord *Cranworth* as to the impropriety of the term 'gross negligence.' Mr. Justice *Crompton*, in delivering the opinion of the court, said (*ante*, p. 23): 'It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron [*Pollock*] in the court below, where he says, "There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;"' and he added, 'for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence is gross negligence.' Mr. Justice *Montague Smith*, in the case in which the above-mentioned observations of Mr. Justice *Willes* were made, said (*ante*, p. 24), 'The use of the term "gross negligence" is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more

correct and scientific to define the degrees of care than the degrees of negligence.' The epithet 'gross' is certainly not without its significance. The negligence for which, according to Lord *Holt*, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility.

"In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating discretion of the judge to distinguish, as well as they can, degrees of things which run more or less into each other" (*Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317, at pp. 336, 337: Lord *Chelmsford*, delivering the judgment of the Judicial Committee).

(e) Gross Negligence and Fraud are not generally Convertible Terms.

"In respect to gross negligence, it is often said, that it is equivalent to fraud, and is evidence of fraud. That it may, in certain cases, afford a presumption of fraud, and, indeed, that in very gross cases it may approach so near, as to be almost undistinguishable from it, may be admitted, especially when the facts seem hardly consistent with any honest intention. But that generally gross negligence and fraud are convertible terms, is a doctrine not supported by any just inference from the authorities in the common law" (Story, s. 19).

"I may observe, that the distinction between negligence and *mala fides* is now firmly established at law. 'Gross negligence' (says Lord *Denman* in *Goodman* v. *Harvey* (1836), 4 Ad. & El. 870, at p. 876) 'may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine.' The doctrines of law and equity upon this point ought to be concurrent" (*Jones* v. *Smith* (1841), 1 Ha. 43, at p. 71: Sir *James Wigram*, V.-C.).

"'Fraud,' in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions" (*In re* Companies Acts, *Ex parte Watson* (1888), 21 Q. B. D. 301, at p. 309: *Wills*, J.).

SECTION IV.

INEVITABLE ACCIDENT.

In spite of all reasonable care and diligence being taken, accidents may happen which will cause the loss of or an injury to the thing bailed. These accidents may prevent a party performing his duty without any default or neglect on his part. He may, nevertheless, contract to perform his duty in any event, no matter what may happen, or he may protect himself against liability in such a case, or the contract, again, may be an open one on the matter. It is intended to deal with all these matters in this section.

Actus Dei nemini facit injuriam—Lex non cogit ad impossibilia.—Bailees in general are liable for negligence or fraud, but not for *inevitable accident*. They are not liable for what they cannot possibly avoid. Bailees in general are not responsible for loss of or injury to the thing bailed which must happen in spite of their exercising even the highest degree of care and diligence. (10)

Of *inevitable accident* or *casus fortuitus* there are two sorts, viz. :

(a) The *act of God* or any overcoming accident produced not by the agency of man, but by some practically irresistible natural cause, *e.g.*, a cataclysm, earthquake, storm, natural sudden death.

(b) *Irresistible force* or any overcoming accident produced wholly or partly by the agency of man, *e.g.* invasion, robbery with violence on land, piracy.

Story, as the next quotation will show, treats inevitable accident or the act of God as one thing and irresistible force as another, but surely irresistible force is a species of the genus inevitable accident.

"Bailees in general are not responsible for losses resulting from *inevitable accident*, or from *irresistible force*, although they may become so liable by special contract, or by some positive policy of the law.

"By *inevitable accident*, commonly called the *act of God*, is meant any accident produced by any physical cause, which is irresistible ; such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by sudden death or illness. By *irresistible force* is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile

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(10) A person hiring a horse to perform a journey is not liable for the value of the horse, if he dies on the road without fault of the hirer (*Dickie* v. *Campbell*, N.B. Reps., Stephen's Digest, 1880, 203).

army, or, as the phrase commonly is, by the king's enemies; that is, by public enemies. In the same manner, losses occasioned by pirates are deemed irresistible, and by hostile force; for pirates are deemed the enemies of the whole human race (*hostes humani generis*), and by the common consent of nations they are, when taken, everywhere punished with death. By the law of nations, they are deemed outlaws, and their crimes, against whomsoever committed, are punishable in the courts of any nation within whose criminal jurisdiction they are brought. Robbery by force is also deemed irresistible" (Story, s. 25, and part of s. 26).

(a) Act of God.

What has been said with regard to definitions in general and legal definitions in particular (*ante*, p. 4, Sect. II. (b)) strongly applies to such a phrase as "the act of God," which in *legal* phraseology would seem to signify an extraordinary inevitable accident occasioned by the elementary forces of nature, unconnected with the agency of man or other cause. This is supported by the following passages:

1. "Now what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge" (*Forward* v. *Pittard* (1785), 1 T. R. 27, at p. 33: Lord *Mansfield*, C.J.).

2. "The act of God means something overwhelming, and not merely an accidental circumstance" (*Oakley* v. *Portsmouth and Ryde Steam Packet Co.* (1856), 11 Ex. 618, at p. 623: *Martin*, B.).

3. "No doubt, as was said by Mr. *McIntyre*, a shower is the act of God as much as a storm; so is an earthquake in this country. Yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*; no doubt not the act of God or a *vis major* in the sense that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so" (*Nichols* v. *Marsland* (1875), L. R. 10 Ex. 255, at pp. 258, 259: *Bramwell*, B.).

4. "It is at once obvious, as was pointed out by Lord *Mansfield*, in *Forward* v. *Pittard* (1785), 1 T. R. 27, that all causes of inevitable accident—'*casus fortuitus*'—may be divided into two classes: those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent

of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable" (*Nugent* v. *Smith* (1876), 1 C. P. D. 423, at p. 435: *Cockburn*, C.J.).

5. "I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence, when, in other words, it does not imply any law from which its recurrence can be inferred, places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule it is not, in my opinion, necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice *Mellish* in the recent case of *Nichols* v. *Marsland* ((1876), 2 Ex. D. 1 at p. 5)" (*Nitro-phosphate, etc. Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, at pp. 515, 516: *Fry*, J.).

(b) Irresistible Force.

Piracy.

"Piracy by the law of nations is:

"Taking a ship on the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county.

"Whoever commits piracy by the law of nations is liable (it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county.

"It is doubtful whether persons cruising in armed vessels with intent to commit piracies, are pirates or not" (Stephens' Dig. Crim. Law, ch. x., art. 104).

Robbery.

"Open and violent larceny from the *person*, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear" (4 Bla. Com. 242, 243).

"If the thing taken and carried away is on the body or in the

immediate presence of the person from whom it is taken, and if the taking is by actual violence intentionally used to overcome or to prevent his resistance, or by threats of injury to his person, property, or reputation, the offence is robbery" (Stephens' Dig. Crim. Law, ch. xxxv., art. 296).

In the case of *Walker* v. *The British Guarantee Association* (1852), 18 Q. B. 277, *Lord Campbell*, C.J., said at p. 286, the general doctrine was not denied, that if the subject-matter bailed be lost by *vis major*, which the court translated as *irresistible violence*, the bailee was discharged, if he was guilty of no default.

(c) When Inevitable Accident is available as an Excuse.

Two rules have been judicially stated as to when inevitable accident excuses or does not excuse a party for the non-performance of a duty. They are as follows:

(a) When the law creates a duty and the party is disabled from performing it without any default of his own, by inevitable accident, the law will excuse him for non-performance.

(b) When a party by his own positive and absolute contract creates a duty, and the party is disabled from performing it without any default of his own by inevitable accident, the law will not excuse him for non-performance, unless an exception in his case is implied by law or expressed in the contract. (11)

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(11) When the lessee of goods covenanted to restore them to the lessor "at the expiration of the term, in as good order as they then were, reasonable wear and tear only excepted," and the goods during the term were destroyed by fire without the lessee's default: *Held*, that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term. *Held*, also, that the exception "reasonable wear and tear excepted" referred to the order and condition of the goods, so as to exclude bad repair, breakages, etc., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods. *Per Hagarty*, C.J.: "When the law creates a duty and the party is disabled from performing it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it. But there are exceptions of some standing. When the contract is for personal service, as by an author to write a book, or a painter to paint a picture, it is deemed subject to a

I think it sufficient to cite the following authorities to prove the existence of these two rules :

1. "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him ; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. . . . But when the party, by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it" (*Paraline* v. *Jane* (1648), Aleyn, 26, at p. 27).

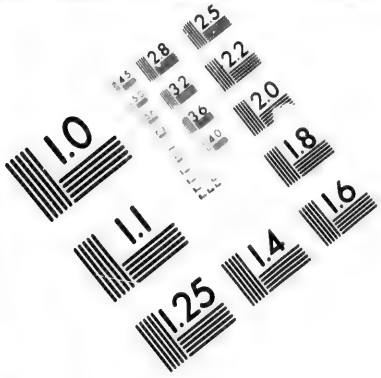
2. "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing, without default of the contractor" (*Taylor* v. *Caldwell* (1863), 3 B. & S. 826, at p. 833 : *Blackburn*, J. ; cited by *Lindley*, L.J., in *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, at pp. 549, 550, and by *Jessel*, M.R., in *In re Arthur* (1880), 14 Ch. D. 603, at p. 608). (12)

3. "By the common law of England a person who expressly

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condition that if the author become insane, or the painter paralytic or blind, and so incapable to perform the contract by the act of God, he is not liable for damages" (*Chamberlain* v. *Trenouth*, 23 U. C. C. P. 497). See also remarks of Burns in *Anglin* v. *Henderson*, 21 U. C. Q. B. 27, *post*.

(12) "The defendant by a bond bound himself to produce the goods and chattels embraced in a chattel mortgage given by the Pettigrews to the plaintiff, when they should make default in the payment, so as to enable



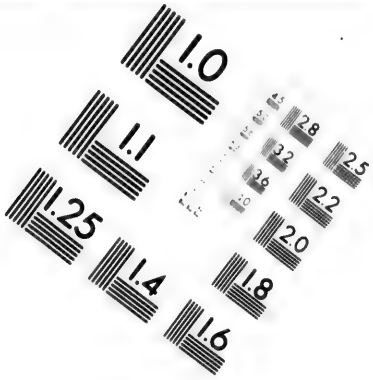
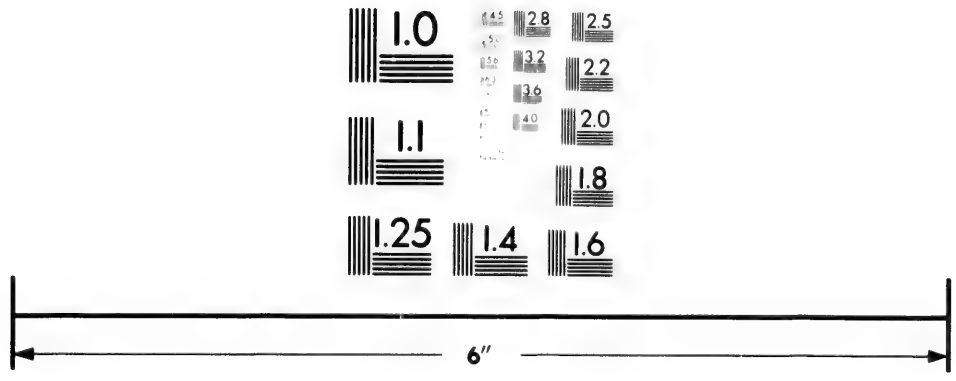
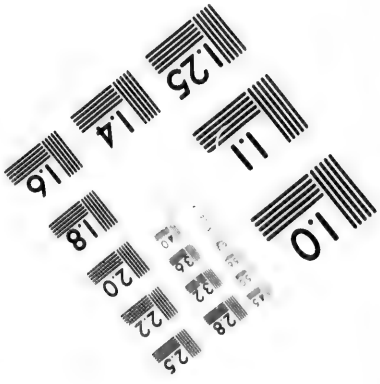


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contracts absolutely to do a thing, not naturally impossible, is not excused for non-performance because of being prevented by the act of God, or the King's enemies (*Paradine* v. *Jane* (1648), Aleyn, 26); and yet, in consideration of the risks to which common carriers are exposed, such prevention is in their case an implied exception. And in the case of ordinary bailees entrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (*vis major*) and accident without fault (*casus fortuitus*) are implied" (*Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, at p. 121: *Willes*, J., delivering the judgment of the court (*Erle*, C.J., *Pollock*, C.B., *Martin*, B., *Willes* and *Keating*, JJ., and *Pigott*, B.)).

4. "The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident

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the plaintiff to seize and sell them under the mortgage. The plea avers that before condition broken, and without any default of the defendant or the Pettigrews, the goods mentioned in the chattel mortgage were destroyed by fire. It seems clear that a contract of this kind is subject to the implied condition that if, before breach, performance becomes impossible, because the specific articles have, without default of the obligor, ceased to exist then performance shall be excused." (*Per Osler*, J., in *Boswell* v. *Sutherland*, 32 U. C. C. P. 133.)

When an act of the legislature makes the performance of the contract unlawful or impossible the breach is excused (*Corporation of York* v. *Toronto*, 21 C. P. 95).

"When an executory contract is entered into, respecting property or goods, if the subject-matter be destroyed by the act of God, or *vis major*, over which neither party has any control, and without either party's default, the parties are relieved. This general principle must apply even more distinctly in a case like the present, where parties choose to bargain respecting a contract as existing, which they equally know has been put an end to by competent authority, and which neither of them, except as a matter of grace, can possibly recall to existence." (*Per Hagarty*, C.J.O.: *McKenna* v. *McNamee*, 14 O.A.R. 339.)

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although in consequence of unforseen causes the performance has become impossible. The defendants hired the plaintiffs' scow and pile driver at a named price per day, they to be responsible for damage thereto, except to the engine and ordinary wear and tear, until returned to the plaintiff. While in defendant's custody, by reason of a storm of unusual force the scow and pile driver were driven from their moorings and damaged. *Held* that the defendants were liable for the damage thus sustained, and for the rent during the period of repair (*Grant* v. *Armour*, 25 O. R. 7).

by inevitable necessity" (*Nichols* v. *Marsland* (1876), 2 Ex. D. 1, at p. 4 : *Mellish*, L.J.).

5. "If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care ; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damages occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man, or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages" (*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 750 : Lord *Cairns*, L.C.).

SECTION V.

CONTRIBUTORY NEGLIGENCE.

Rules have been stated in the last section as to when inevitable accident is available as an excuse on behalf of a party for the non-performance of his duty. Another excuse is also available, namely, that of contributory negligence.

Definitions.

Contributory Negligence is the plaintiff's negligence which precludes him from recovering damages for the defendant's negligence.

Contributory Negligence is the non-exercise by the plaintiff of such ordinary care, diligence, and skill as would have avoided the consequences of the defendant's negligence. (13)

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(13) Where the trial judge directed the jury that, assuming defendants to have been guilty of neglect, they must determine whether plaintiff did or did not so far contribute to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of care the accident would not have happened, it was held that this direction was right (*Winckler* v. *Great Western Railway*, 18 U. C. C. P. 250).

The above definitions are subject to this qualification, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the misfortune, yet if the defendant could in the result, by the exercise of ordinary care, diligence, and skill, have avoided the consequences of the plaintiff's negligence, the plaintiff's negligence will not preclude him from recovering.

That what I have stated is well established appears from the following judicial opinions :

1. "One person being in fault will not dispense with another's using ordinary care for himself" (*Butterfield* v. *Forrester* (1809), 11 East, 60, at p. 61 : Lord *Ellenborough*, C.J.).

2. "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (1809), 11 East, 60 ; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover ; if by ordinary care he might have avoided them, he is the author of his own wrong" (*Bridge* v. *The Grand Junction Rail. Co.* (1838), 3 M. & W. 244, at p. 248 : *Parke*, B.).

3. "This subject was fully considered by this court in the case of *Bridge* v. *The Grand Junction Rail. Co.* (1838), 3 M. & W. 244, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature [for negligence], must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that, 'the rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (1809), 11 East, 60, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover ; if by ordinary care he might have avoided them, he is the author of his own wrong'" (*Davies* v. *Mann* (1842), 10 M. & W. 546, at pp. 548, 549 : *Parke*, B.).

4. "In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident ; and in these cases the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted *donkey case*, *Davies* v. *Mann* (1842), 10 M. & W. 546. There, although without the negligence of the plaintiff the accident could

not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss" (*Dowell* v. *The General Steam Navigation Co.* (1855), 5 El. & Bl. 195, at p. 206: Lord *Campbell*, C.J., delivering the judgment of the court (Lord *Campbell*, C.J., *Coleridge*, *Erle*, and *Crompton*, JJ.), (cited by *Cresswell*, J., in *Tuff* v. *Warman* (1857), 2 C. B. (N.S.) 740, at p. 756)).

5. "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover; in the latter, not, as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the judges in *Butterfield* v. *Forrester* (1809), 11 East, 60; *Bridge* v. *The Grand Junction Canal Co.* (1838), 3 M. & W. 244; *Davies* v. *Mann* (1842), 10 M. & W. 546; and *Dowell* v. *The General Steam Navigation Co.* (1855), 5 El. & Bl. 195" (*Tuff* v. *Warman* (1858), 5 C. B. (N.S.) 573, at p. 585: *Wightman*, J., delivering the judgment of the court (*Wightman*, *Erle*, and *Crompton*, JJ., *Watson*, *Bramwell* and *Channell*, BB.).

6. "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (1842), 10 M. & W. 546: supported in that of *Tuff* v. *Warman* (1858), 5 C. B. (N.S.) 573, and other cases, and has been universally applied in cases of this character without question" (*Radley* v. *London and North Western Rail. Co.* (1876), 1 App. Cas. 754, at p. 759 : Lord *Penzance*).

SECTION VI.

DUTIES OF JUDGE AND JURY IN QUESTIONS OF NEGLIGENCE.

1. The question whether there has been negligence is one of fact for the jury when they have had all the legal technicalities, affecting the case before them, explained by the judge. If, however, in the opinion of the judge the facts proved by the plaintiff do not reasonably bring the case within the legal principle, he should withdraw the case from them.

2. The judge has to say whether any facts have been established from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. (14)

In support of the above rules it is enough to refer to two recent cases in the House of Lords, and to give extracts from the opinions of the learned judges delivered at the hearing of the appeal of the first case and the statement of Lord *Cairns*, L.C., in the second case, that it is impossible to lay down any rule except the second proposition above set out.

1. "Although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty

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(14) The defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan:—*Held*, not a case in which there should be a nonsuit, on the ground that the evidence was consistent either with the existence or non-existence of negligence, but that the question was for the jury (*Henderson* v. *Barnes*, 32 U. C. Q. B. 176). See also *Boyle* v. *Dundas*, 25 U. C. C. P. 420, where the authorities are reviewed.

of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case ; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration" (*Bridges* v. *Directors, etc. of North London Rail. Co.* (1874), L. R. 7 H. L. 213, at pp. 221, 222 : *Pollock*, B.).

2. "The question of negligence is one peculiarly within the province of a jury, and I apprehend that it is a question with the decision of which the judge should not interfere, unless he is very certain that the question has been reduced to a mere definition of what is the defendant's legal duty in respect of the matters wherein negligence is alleged, upon a well ascertained and indisputable state of facts. The legal duty itself often depends upon the question what would it be reasonable for a plaintiff or a defendant to do under a complicated state of facts ; and this also is a question not of law but of fact, and as such peculiarly within the province of a jury" (*ibid.* at p. 229 : *Denman*, J.).

3. "Before giving this direction [the direction of the judge to the jury], it is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This, being a duty cast exclusively on the judge, is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the judge is bound to apply to the evidence in order to determine this question of law? It cannot merely be, Is there evidence? That has no meaning without a further proposition defining when it is to be considered in point of law that there is evidence. Without a proposition or rule which can be enunciated or predicated, there is no rule of law ; a rule of law can always be predicated in terms. The proposition seems to me to be this : Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the judge after all to say whether in his individual opinion the facts in evidence would prove the proposition ; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And judges may be able reasonably to say frequently, that, although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the

conclusion of the jury; or in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it" (*ibid.* at pp. 232, 233: *Brett*, J.).

4. "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred, and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. . . . Your lordships, in the case of Bridges [*Bridges* v. *North London Rail. Co.* (1874), L. R. 7 H. L. 213], did not lay down, and I am satisfied your lordships did not mean to lay down, any new rule upon this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred" (*Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193, at pp. 197, 200: Lord *Cairns*, L.C.).

SECTION VII.

PROPERTY IN GOODS AND CHATTELS.

Absolute property—Qualified property.

It is very essential, in dealing with questions of bailment, that a clear distinction should be discerned between the kinds of property in goods and chattels which bailments give rise to.

Supposing a person has the absolute ownership, which includes actual possession, of a chattel, and that he bails this chattel to another person. He, the bailor, clearly parts temporarily with the *actual possession* by his delivery of the chattel to the bailee. During such period as the bailee continues to actually possess the chattel, the bailor's original ownership is wanting that

of actual possession. The bailor's ownership, therefore, for that period is no longer absolute, but is qualified by the actual possession of the bailee, and his interests and rights in the chattel, and may therefore be called a *qualified property*. The bailee's interest, which is carved out of the bailor's original absolute ownership, may be called a *special property*.

Blackstone, in his Commentaries, describes the bailor's interest as *property in action* or *chose in action*, and he calls absolute property by another name, viz., *possession absolute*. He also describes the bailee's special property as a *possessory interest*. *Stephen*, J., in his Digest of Criminal Law, says that the bailee in the above circumstances is said to be the *special owner*, or to have a *special property*. (See *infra*, (a) Text writers' views).

It will be seen also that the bailee is considered by the courts as having a *special property* in the chattel bailed. (See *post*, p. 41, (b) Judicial views).

(a) Text writers' views.

1. "*Property* in chattels personal may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property" (2 Bla. Com., p. 389).

2. "*Possession absolute* is where a man hath, solely and exclusively, the right, and also the occupation, of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default" (2 Bla. Com., p. 389).

3. *Qualified, limited, or special property* is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist (2 Bla. Com., 391).

4. "These kinds of qualification in property (qualified property in animals *feræ naturæ*, etc.) depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of *bailment*, or delivery of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the

bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, immediately, his possession also. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so, too, is that of the pledgee, which depends upon its non-performance" (2 Bla. Com., pp. 395, 396).

5. "In all these instances [of bailments], there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his contract for restitution; the bailor having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest against any stranger or third person. For, being responsible to the bailor, or if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor" (2 Bla. Com., p. 453).

6. "Every bailee has a temporary *qualified* property in the things of which possession is delivered to him by the bailor, and has, therefore, a possessory action or an appeal in his own name against any stranger who may damage or purloin them" (Sir William Jones, p. 80).

7. "Every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the *special owner* thereof, or to have a *special property* therein" (Stephen's Dig. Crim. Law., ch. xxxiii., art. 282).

8. "Every person who has obtained *by any means* the possession of any movable thing is deemed to be the *special owner* thereof, as against any person who cannot show a better title thereto" (*ibid.*, art. 283).

(b) Judicial views.

1. "Here the plaintiff has possession under the rightful owner, and that is sufficient against a person having no colour of right. An agister, etc., a carrier, a factor, may bring trover: even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner. Here is a general bailment. It would be monstrously inconvenient if a wrongdoer could come and take things out of the possession of him who had the possession under the rightful owner" (*Sutton* v. *Buck* (1810), 2 Taunt. 302, at p. 309: *Chambre*, J.).

2. "It is unnecessary, in this case, to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels" (*Elliott* v. *Kemp* (1840), 7 M. & W. 306, at p. 312; *Parke*, B.) This question was decided in the affirmative in the case of *Jeffries* v. *Great Western Rail. Co.* (1856), 5 El. & Bl. 802.

SECTION VIII.

LARCENY FROM OR BY BAILEES OR BY BAILORS.

If the bailee has not been guilty of any negligence and the goods are stolen he is not liable to an action for negligence.

The *onus probandi* of negligence lies on the plaintiff. The bailee has a right to prosecute the thief. These propositions are established by the following authorities:

1. The defendant Small was an upholsterer; the plaintiff was an officer in the army, and being about to leave London, sent his trunk to the defendant's house for *safe custody*, and he was to pay him 1*s.* per week for the *house-room*. When the plaintiff returned, he received the trunk, but the whole of the contents had been taken out.

"To support an action of this nature [on the case for negligence in keeping the trunk], positive negligence must be proved. It has appeared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if

such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own" *Finucane* v. *Small* (1795), 1 Esp. 315, at pp. 316, 317: Lord *Kenyon*).

2. "Mr. Justice Story, in s. 335, cites *Finucane* v. *Small* (1795), 1 Esp. 315, and says: 'If, indeed, the circumstances of the case prove that the theft has been occasioned by negligence, or want of proper caution, there, the pawnee may properly be held responsible.' Section 454 (Story) seems to explain the whole matter: 'In respect to depositaries for hire,' it is said, 'there seem some discrepancies in the authorities, whether the *onus probandi* of negligence lies on the plaintiff, or of exculpation on the defendant, in a suit brought for the loss. In England, the former rule is maintained.' The result is, that a replication of felony would be no answer to the plea" (*Butt* v. *The Great Western Rail. Co.* (1851), 11 C. B. 140, at p. 151: *Jervis*, C.J.).

3. In *Rex* v. *Wilkinson* (1821), Russ. & Ry. 470, the prosecutors, Marsh and Co., were lightermen and agents, and were employed by one Cooper, a merchant, who delivered them warrants properly filled up, to enable them to pass 30 bales (weighing 6,696 pounds) of *nux vomica*, the property of Marsh and Co., through the custom house, for exportation to Amsterdam. For exportation this commodity paid no duty.

Marsh and Co. entered the bales for a vessel about to sail to Amsterdam, then lying in the London dock, and having done what was necessary, delivered back the cocket bill and warrants to Cooper, considering him as the owner, and Marsh and Co. gave a bond to government with Cooper, under a penalty, to export these goods. Marsh and Co. were to be paid for lighterage, and for their services. Marsh and Co.'s servant stole the *nux vomica*.

Seven of the judges, viz., *Garrow*, B., *Holroyd*, *Park*, *Bayley*, JJ., *Richards*, C.B., *Dallas*, C.J., *Abbott*, L.C.J., held it a larceny, because Marsh and Co. had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of some of the seven judges, this would have been larceny, although there had been no felonious intent against Marsh and Co., but only an intention to defraud the Crown.

Larceny by Bailees.

20 & 21 Vict. c. 54 (Punishment of Frauds Act, 1857), s. 4.—If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny (Rep. 24 & 25 Vict. c. 95, s. 1). (15) "This conviction cannot be sustained.

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(15) Section 4, chapter 164, Consolidated Statutes of Canada, 1886, is as follows:—Everyone who, being a bailee of any chattel, money, or valuable securities, fraudulently takes or converts the same to his own use or to the use of any person other than the owner thereof, although he does not break bulk or otherwise determine the bailment, is guilty of larceny, and may be convicted thereof on an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

In *McIntosh* v. *The Queen*, 23 S. C. R. 180, it was *held*, affirming the judgment of the Court of Queen's Bench for Quebec, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted, under s. 85, c. 164, R. S. C., 1886, of receiving it, knowing it to have been unlawfully obtained.

As to the fraudulent conversion of negotiable securities by trustee, see *R.* v. *Barnett*, 17 O. R. 649.

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant, he found that he had absconded; that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in gaol charged with stealing the money:—*Held*, that this evidence sufficiently showed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny under Consolidated Statutes of Canada, c. 92, s. 55 (*repealed* by c. 164 Consolidated Statutes, 1886), and a non-suit was ordered (*Livingstone Estate* v. *Massey*, 23 U. C. Q. B. 157).

Hagarty, J.: "Under s. 55, if defendant, being a bailee of property, fraudulently took or converted it to his own use, or the use of any person other than the owner, although he might not have broken bulk or otherwise determined the bailment, he would be guilty of larceny."

Hagarty, J.: "I think it very important to notice that what the statute law makes a felony is a subsequent fraudulent dealing with goods lawfully received by defendant."

Defendant hired a pair of horses from a livery stable to go to a particular place, and afterwards absconded with them. The jury found that at first he did not intend to do that, but having accomplished the object of hiring, he then made up his mind to convert them to his own use:—*Held*, that he was a bailee within Consolidated Statutes of Canada, c. 92, s. 55, and that he was properly convicted on an indictment for larceny in the ordinary form (*R.* v. *Tweedy*, 23 U. C. Q. B. 120).

This case, a counterpart of *R.* v. *Haigh*, 7 Cox C. C. 403.

The prisoner is indicted under the 4th section of the 20 & 21 Vict. c. 54, for larceny as a bailee. The word bailment must there be understood in its legal acceptation, viz., a deposit of something to be returned in specie, and does not apply to the receipt of money, with an obligation to return the amount when there is no obligation to return the identical coin" (*Hassall's Case* (1861), Leigh & Cave, C. C. 58, at pp. 63, 64 : *Cockburn*, C.J.; see, however, *R.* v. *Robson*, *ibid.*, p. 93). (16)

24 & 25 Vict. c. 96 (Larceny Act, 1861), s. 3—Larceny by bailees.—Whosoever, being a bailee of any chattel, money or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny; but this section shall not extend to any offence punishable on summary conviction.

No contract, express or implied, need arise out of the bailment for a conviction under this section (see *The Queen* v. *McDonald* (1885), 15 Q. B. D. 323, and see text books on Criminal Law for other decisions on this section).

Larceny by Bailors.

Theft may be committed by a general owner to the prejudice of a special owner upon a chattel in which both general and special ownership exist (Stephen's Dig. Crim. Law, ch. xxxv., art. 301).

SECTION IX.

CONFUSION OF BAILED GOODS BY BAILEES. (17)

There may be a confusion of the goods bailed by various owners. This confusion may arise from some *accident*, *e.g.*, the obliteration of distinctive marks and numbers of bales of cotton, or the commingling of such commodities as tallow, india-rubber, or sheets of

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(16) Money is property of which a person can be bailee so as to make him guilty of felony if he appropriate it to his own use (*R.* v. *Massey*, 13 U. C. C. P. 484).

Chapter 92, Consolidated Statutes of Canada, s. 67, is similar to Imperial Statute 21 Vict. c. 54, ss. 4—17. This statute was repealed by Consolidated Statutes, c. 164, 1886, and re-enacted.

(17) *Confusion of goods by bailees.*—When T., having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it was held that it became his duty to enable the plaintiffs to recover

lead belonging to various owners caused by being melted or fused by a fire at a warehouse, or of oil by the leakage of casks on board ship.

The confusion, on the other hand, may arise from the bailee *wrongfully* mixing his own goods with like goods of his bailor or bailors, *e.g.*, flour, corn, straw, or hay, so as to become undistinguishable. To such confusion of goods the rules applicable are as follows :

Mixture by Consent or Accident.

When goods of different owners become by *consent* or by *accident* so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportion which they have severally contributed to it.

Mixture by Wrongful Act or Default.

When goods of different owners become, by the *wrongful act or default* of one owner, so mixed together as to be undistinguishable, such owner will not become one of the tenants in common of the whole, nor will he be entitled to his proportion or any part of the property so mixed up.

The above rules are, I think, consistent with what authorities there are on this subject, and are supported by the following quotations given in chronological order :

1. "In the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and

Canadian Cases.

what the receipts called for, or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and plaintiffs entitled to succeed as against execution creditors (*Bank of Hamilton* v. *Noye*, 9 O. R. 639).

Where defendants were bailees of grain belonging to third parties, and plaintiff's grain was stored in the same building, which was destroyed by fire : —*Held*, that defendants were not justified in refusing plaintiffs permission to take the grain away if they could find it, because it could not be separated from the grain, of which defendants were the bailees (*Moffatt* v. *Grand Trunk Railway*, 15 C. P. 392).

If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as the unexpended balance (*Carter* v. *Long*, 23 O. A. R. 121 ; 26 S. C. R. 430).

partly differs from, the civil. If the intermixture be by consent, I apprehend that in both cases the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain without his own consent" (2 Bla. Com. 405).

2. **Mixture by tortious act.** (18)—"If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction in which the former was, not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice, that such should not be the state of things between them, by those means preventing the guard, which the court would have effectually interposed, is the argument to be endured, that, as the party, so injured cannot distinguish his property, therefore he shall have nothing? That is not the law of this country, as administered in courts either of law or equity. The case of the diamond ring (*Armory* v. *Delamirie* (1722), 1 Str. 505), found by a poor boy, proves the contrary. He had not the means of showing the value. The person who took it from him, by wrong, prevented the jury from ascertaining the value by production of the ring, or other evidence. Therefore, as it was proved, that the plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief Justice [*Pratt*] directed the jury to find, that the stone was of the utmost value they could find; upon this principle, that it was the defendant's own fault, by his own dishonest act, that the jury could not find the real value. The case of *Panton* v. *Panton* applies to this.

Canadian Cases.

(18) *Mixture by tortious act.*—The onus of distinguishing the plaintiff's property from others should be thrown on those causing the confusion. (*Per Hagarty*, C.J. : *Great Western Railway* v. *Hodgson*, 44 U. C. R. 187).

Where one party wrongfully intermingles his logs with those of another, all the party whose logs are intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for those which he originally possessed. (*Per Strong*, J., in *McDonald* v. *Lane*, 7 S. C. R. 462.)

Judgment of Nova Scotia Supreme Court affirmed.

A clerk in a banking-house at Chester remitted his own money, with that of his employer, to an agent in London to be laid out upon security ; and by management the securities were so changed that the property could not be distinguished. The Court of Exchequer held, that, the confusion being occasioned by him, who so dealt with the property, the distinction lay upon him ; and if he could not distinguish what was his own, the whole must be considered as belonging to the other" (*Lupton* v. *White* (1808), 15 Ves. 432, at pp. 439, 440 : Lord *Eldon*, L.C.).

3. "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity ; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the original value of his property, he must have the whole" (*ibid.* at p. 442).

4. **Mixture by accident.** (19)—"In our own law there are not many authorities to be found upon this subject ; but, as far as they go, they are in favour of the view, that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of *Blackburn*, J., in the case of the tallow which was melted and flowed into the sewers is to that effect (*Buckley* v. *Gross* (1863), 3 B. & S. 566, at p. 574). And a similar view was adopted

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Canadian Cases.

(19) *Mixture by accident.*—When plaintiff's wool was being carried by defendants from Toronto to Boston, along with other wool belonging to third parties, the wool was partly destroyed, and what was saved became mixed :—*Held*, that while defendants were not liable for the loss by fire, they were liable for the wool belonging to plaintiff which they carried to Boston, and did not deliver, but that if plaintiff, with the knowledge of all the circumstances the evidence disclosed, took the one kind for the other, and sold it, when he might have had his own, which was delivered to another party, then no action would lie (*Milligan* v. *Grand Trunk Railway*, 17 U. C. C. P. 115).

In *Lawrie* v. *Rathbun*, 38 U. C. Q. B. 255, where the authorities are fully reviewed, it was held that, when the mixture is intentional, but in good faith, and when the goods can be by the person who mixed them distinguished and separated, such mixture does not change ownership. In the case of confusion of property, where the goods of two persons are so intermixed that the several portions can no longer be distinguished, the English law partly agrees with, and partly differs from, the civil.

by Lord *Abinger* in the case of the mixture of oil by leakage on board ship in *Jones* v. *Moore* (1841), 4 Y. & C. 351.

"It has been long settled in our law, that, where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner: but no authority has been cited to show that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*.

"The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and, as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested as tenants in common in the bulk" (*Spence* v. *Union Marine Insurance Co.* (1868), L. R. 3 C. P. 427, at pp. 437, 438: *Bovill*, C.J., delivering the judgment of the court (*Bovill*, C.J., *Willes*, *Keating*, and *Montague Smith*, JJ.)). (20)

5. "When the bales became unidentifiable [by the obliteration of their distinctive marks and numbers], the several owners of cotton became, in point of law, owners in common of them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: *Spence* v. *Union Marine Insurance Co. Ltd.* (1868), L. R. 3 C. P. 427" (*Smurthwaite* v. *Hannay*, [1894] A. C. 494, at p. 505: Lord *Russell of Killowen*).

Canadian Cases.

(20) Where plaintiff replevied certain logs from defendants under a bill of sale, and among those rightfully belonging to him were a number belonging to defendants, which the latter had mixed up with them under the belief that they were all their own:—*Held*, that the defendants should have an opportunity of proving what part belonged to them, and what to the plaintiff. *Per Sir William Young*, C.J.: "When the quality of the articles is uniform, and the original quantities are known or are capable of proof, the party by whose act the confusion took place, would still be entitled, as it seems, to claim his proper quantity" (*Stewart* v. *Wheeler*, 3 Geldert and Oxley (N.S.) 414).

SECTION X.

CLASSIFICATION OF THE DIFFERENT SORTS OF BAILMENTS.

Bailments may be divided *first* into two broad classes as follows:

(*a*) Those in which either the bailor or bailee is solely benefited by the bailment.

(*b*) Those in which both the bailor and bailee are benefited.

Secondly, into two other broad classes, viz.:

(i) Gratuitous bailments.

(ii) Bailments for reward.

Class (*a*) or class (i) includes what are legally and technically called deposits, mandates, and gratuitous loans for use.

Class (*b*) or class (ii) includes what are called pledges and hirings.

Lord *Holt*, in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at pp. 912, 913, says:

"And there are *six* sorts of bailments.

"The *first* sort of bailment is a bare, naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*.

"The *second* sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; and this is called *commodatum* because the thing is to be restored *in specie*.

"The *third* sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*.

"The *fourth* sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge.

"The *fifth* sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them.

"The *sixth* sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage."

It will be seen that Lord *Holt's* first, second, and sixth sorts come under class (*a*) or class (i), and his third, fourth, and fifth sorts come under class (*b*) or class (ii). Lord *Holt* seems to have put his sixth sort, viz., a gratuitous bailment, out of its natural place, and last, because, in all probability, it was the particular case he had to deal with.

Sir *William Jones*, at pp. 35, 36, acknowledges but *five* species of bailments, which he enumerates, and defines with all their Latin names (some of which, it may be remarked, Lord *Holt* omitted). They are as follows :

1. "*Depositum*, which is a naked bailment, *without reward*, of goods to be *kept* for the bailor.

2. "*Mandatum* or *commission*, when the mandatary undertakes, *without recompense*, to *do some act* about the things bailed, or simply to *carry* them.

3. "*Commodatum* or *loan for use*, when goods are bailed *without pay*, to be *used* for a certain time by the bailee.

4. "*Pignori acceptum*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt.

5. "*Locatum* or *hiring* which is always for a *reward*."

Sir *William Jones* again at pp. 117, 118, puts those definitions synthetically in the same order, but in somewhat different language. It will, however, be noticed that Nos. 1, 2, and 3 came under class (*a*) or class (i), and Nos. 4 and 5 came under class (*b*) or class (ii).

Story (s. 3) considers that bailments are properly divisible into *three* kinds, as follows :

1. "Those in which the trust is exclusively for the benefit of the bailor, or of a third person.

2. "Those in which the trust is exclusively for the benefit of the bailee ; and

3. "Those in which the trust is for the benefit of both parties, or of both or one of them and a third party."

The first (he says) embraces Deposits and Mandates ; the second, Gratuitous Loans for Use ; and the third, Pledges or Pawns, and Hiring, and Letting to Hire.

Story's first and second kinds, therefore, come under class (*a*) or class (i), and his third kind comes under class (*b*) or class (ii).

Sir *William Jones* appears to adopt the order of : (1) Deposits ; (2) Mandates ; (3) Loans for Use ; (4) Pledges ; (5) Hirings.

I divide bailments into two broad classes, viz., *Gratuitous Bailments* and *Bailments for Reward*. The former class I sub-divide into Deposits, Mandates, and Loans for Use ; the latter class into Pledges and Hire.

PART II.—GRATUITOUS BAILMENTS.

CHAPTER II.

DEPOSITS.

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SECTION II.—*Contract of Deposit*—
(*a*) *Parties*, p. 52.
(*b*) *Deposits classified and distinguished: Necessary — Voluntary — Involuntary*, p. 52.
(*c*) *Subject-matter of Deposits*, p. 53.
(*d*) *Title of Depositor to Deposit*, p. 53.
(*e*) *Delivery and Custody of Deposit*, p. 53.
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SECTION III.—*Depositary's Duty and Responsibility*, p. 56.

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SECTION V.—*Possessory Interest and Right of Action of Depositary*, p. 73.

SECTION VI.—*Depositary's Right to use the Deposit*, p. 78.

SECTION VII.—*Re-delivery of Deposit and Determination of Deposit*, p. 79.

SECTION VIII.—*Action for the Return of Deposit or its Value, and Damages for its Detention*, p. 83.

SECTION IX.—*Title of Third Person to Deposit*, p. 91.

SECTION X.—*Depositary's Lien*, p. 97.

SECTION XI.—*Statute of Limitations*, p. 100.

Deposits come under that class of bailments in which the bailor is solely benefited by the bailment, and is the first sub-division of the class of gratuitous bailments that will be dealt with.

SECTION I.

DEFINITIONS OF DEPOSIT.

Lord *Holt* says, in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 908, at pp. 912, 913, that a *depositum* is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor.

Sir *William Jones* defines a *depositum* as a naked bailment, *without reward*, of goods *to be kept* for the bailor (p. 36).

Story says that perhaps a more correct definition would be, that a *deposit* is a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust; for (he adds) in some cases the deposit may be for the benefit of a third person, and to be delivered to him when demanded, and not to be returned to the bailor (s. 41).

The above technical meaning must not be confused with the other legal meanings which the word "deposit" has, *e.g.*, an earnest for the performance of a contract, part payment of purchase money, a loan, an equitable mortgage, a pawn or pledge, and placing money on deposit at a bank.

The person making the deposit is called the bailor or depositor, and the person to whom the deposit is made is called the bailee or depositary.

From these definitions it appears that:

(i.) The subject-matter of a deposit is *goods or chattels.*

(ii.) The goods or chattels must be *delivered.*

(iii.) The deposit must be *gratuitous.*

(iv.) The goods or chattels must be *re-delivered* by the depositary according to the object of the deposit.

SECTION II.

CONTRACT OF DEPOSIT.

(a) Parties.

Parties between whom Deposits may be made.

The capacity to be parties to a deposit is regulated by the general law concerning capacity to contract (see *ante*, p. 10, Chapter I., Section II. (h) Parties to a Contract of Bailment).

(b) Deposits Classified and Distinguished.

Necessary—Voluntary—Involuntary.

Deposits are divisible into two kinds, *necessary* and *voluntary.* A *necessary deposit* is such as is made by the party upon some sudden emergency, and from some pressing necessity, as, for instance, in case of a fire, a shipwreck, or other *overwhelming calamity*; and it is, therefore, confided to any person, with whom the depositor meets, *without any proper opportunity for reflection or choice*; and thence it is called *miserabile depositum.* A *voluntary deposit* is such as arises without any such such calamity, from the *mere consent and agreement of the parties.* . . . There is another class of deposits which may properly be called *involuntary*, as contradistinguished

from necessary and voluntary, inasmuch as each of the latter presupposes some act of the depositor, whereas involuntary deposits *may be without the assent, or even knowledge, of the depositor*. Thus, for example, where lumber, floating in a river, is by a great flood or freshet thrown upon the land of another person, and is there left by the subsidence of the stream, it may properly be called an involuntary deposit. (See Story, ss. 44, 44a).

(c) Subject-matter of Deposits.

By the definition of deposit "goods or chattels" are the subject-matter of this kind of bailment. The word "goods" is synonymous with the word "chattels," so that it would seem that the subject-matter of deposits includes goods and chattels which are *capable of being delivered* by one man to another, that is *movable* goods or chattels or chattels personal or things personal. *Story* (s. 51) says: "In respect to the subject-matter, it is in our law limited to personal or movable property, and is inapplicable to real or immovable property."

(d) Title of Depositor to Deposit.

As a general rule a bailee cannot dispute the title of his bailor. (See *post*, p. 91, Section IX., Title of Third Person to Deposit).

(e) Delivery and Custody of Deposit.

According to the definitions of "deposit" there must be a *delivery* of the goods or chattels to and a keeping of them by the bailee. The delivery may, of course, be a *de facto* or an *actual* delivery, *e.g.*, by hand if the goods are not too bulky, or by a vehicle or vessel if the goods are too bulky for manual delivery. The delivery may also be *symbolical or constructive*, *e.g.*, by delivery of the key of the warehouse where the goods or chattels are stored; or something may be done which is equivalent to delivery, *e.g.*, a taking of the goods or chattels without any actual delivery, as when the bailee already has possession of the goods or chattels, or where they are lost by one and found by another. (1)

Again, the general principles of the law of agency apply, and the bailor and bailee may each act through the medium of another party, who may be constituted an agent either by express appointment or by implication of law arising from the circumstances in

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Canadian Cases.

(1) In *Fiddes* v. *Henderson*, N. B. Rep. C. MS. 47, it was held that a symbolical delivery of a bulky article, such as timber, was sufficient to pass property. See also *Morrison* v. *Thompson*, 2 Russell & Chesney (N.S.) 411; *Dendy* v. *Goodenough*, *post*, p. 144; and remarks by *Strong*, J., in *Kinloch* v. *Scribner*, *post*, p. 144.

which the parties are placed, the maxims *Qui per alium facit per seipsum facere videtur* and *Omnis ratihabitio retrotrahitur, et mandato æquiparatur* applying to deposits. (See also *post*, Chapter V., Pledges, Section II., (c) Delivery.)

Story says (s. 55): "In respect to an implied or constructive delivery, any circumstances which establish that the bailee assents to hold the property for another, although the same may not be in his actual possession, will be sufficient for this purpose. As, if a creditor, holding a pledge, assent, after payment of the debt, to hold it for the benefit of his debtor, it becomes a deposit. So, if a thing is hired, and the purpose of the hiring has been executed, and the property still remains with the hirer, with the assent of the lender, it becomes a virtual deposit with the hirer."

Bonion's Case.

"The most ancient case that I can find in our books on the doctrine of deposits (there were others, indeed, a few years earlier which turned on points of pleading) was adjudged in the eighth of Edward II. (1315), and is abridged by Fitzherbert (Mayn. Edw. II. 275, Fitz. Abr. tit. Detinue, 59). It may be called *Bonion's Case* from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for *seals*, *plate*, and *jewels*, and the defendant pleaded, 'that the plaintiff had bailed a chest *to be kept*, which chest was *locked*; that the bailor himself took away the key *without informing the bailee of the contents*; that robbers came in the *night*, *broke open the defendant's chamber*, and carried off the chest into the fields, where they forced the lock, and took out the *contents*: that the defendant was robbed at the same time of his own goods.' The plaintiff replied, 'that the jewels were delivered in a chest *not locked*, to be restored at the pleasure of the bailor'; and *on this*, it is said, *issue was joined*" (Sir William Jones, pp. 36, 37).

In dealing with *Bonion's Case*, *Holt*, C.J., in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at p. 914, says: "As for 8 Edw. 2, Fitzh. Detinue 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other.

. . . But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice *Pemberton's* time, and ever since, against the opinion of that case."

In *Bonion's Case* it seems to me that the plaintiff intended to entrust a chest containing seals, plate, and jewels, and the defendant intended to be entrusted with a chest, the contents of which were unknown to him. Unless there was something in the make of the chest, or some other circumstance which disclosed the fact that it was a plate chest or jewel box, it would be impossible to apply the doctrine of constructive notice to the case. Surely it was more the duty of the bailor to inform the *gratuitous* bailee of the nature of the contents so as to give him an opportunity of declining so onerous a charge, than it was the duty of the *gratuitous* bailee to ascertain what exact degree of care and diligence was required of him. The acquiescence of the defendant, without full and sufficient knowledge and understanding of the degree of care and diligence required, was brought about by the reticence of the plaintiff as to the contents of the chest. Such being the case I do not see how there was any *consensus ad idem* to make a binding contract of bailment. (See also Section III., *post*, p. 56.)

(f) Consideration.

Consideration defined.—"What is the meaning of the term consideration? It is defined to be any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant—Sel. Ni. Pri., 8th edit. p. 47" (*Laythoarp* v. *Bryant* (1836), 3 Scott, 238, at p. 250: *Tindal*, C.J.).

"The definition of 'consideration' given in Selwyn's Nisi Prius, 8th edit., p. 47, which is cited and adopted by *Tindal*, C.J., in the case of *Laythoarp* v. *Bryant*, is this: 'Any act of the plaintiff, etc. [see *supra*]' . . . Inconvenience sustained by one party at the request of the other is enough to create a consideration" (*Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, at p. 271: *Bowen*, L.J.).

A Bailee's Taking Goods into his Possession is a Sufficient Consideration.—"An action indeed will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the *warranty*, upon which I have been contented

to *trust* you with the goods, which, without such a warranty, I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed *a trust* in you upon your undertaking, if I suffer when I have so relied upon you, I shall have my action" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 911: *Powell*, J.). (2)

A breach of *trust* undertaken voluntarily will be a good ground for an action" (*ibid.*, *Holt*, C.J., at p. 919). "And so a bare being *trusted* with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession" (*ibid.* at p. 920).

"In that case (*Coggs* v. *Bernard* (1704), Ld. Raym., 909, at p. 911), *Powell*, J., said: 'An action will not lie for not doing the thing for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act'" (*Elsee* v. *Gatward* (1793), 5 T. R. 143, at p. 149: Lord *Kenyon*, C.J.).

Care should be taken in cases of deposit to see whether any reward whatever is to be given or paid for the *custody* of the goods, or for house or room rent only. (See *Finucane* v. *Small* (1795), 1 Esp. 314 *ante*, Chapter I., Section VIII., p. 42; see also *post*, Chapter III., Mandates, Section II., (e) Consideration.)

SECTION III.

DEPOSITARY'S DUTY AND RESPONSIBILITY.

A gratuitous bailee or depositary is bound to exercise *reasonable* care and diligence in keeping the goods entrusted to his charge (that is to say, such care and diligence as persons ordinarily use in

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(2) Plaintiff entrusted 500 dols. to defendant, who signed a receipt, stating it was to be lent, with 300 dols. of his own, to one H. on storehouses, security to be in defendant's name. Defendant took a bond not registered. The money being lost, it was held that, notwithstanding defendant acted gratuitously, he was liable, as it was a contract on good consideration, the entrusting him with money, and that having broken it he was liable. The agreement to "secure" the money upon the storehouses required defendant to obtain a valid legal charge thereon (*Holmes* v. *Thompson*, 38 U. C. Q. B. 292, *ante*, p. 19). See also *School Trustees* v. *Farrell*, 27 U. C. Q. B. 321.

The plaintiff was a judgment debtor, and was ordered by the county court judge to deliver some promissory notes, which he admitted to have possession of, to the defendants, to be collected by them, and applied upon the judgment. The plaintiff afterwards, in order to avoid a committal, delivered the notes to the county court clerk for the use of the defendants:—*Held* (*Hagarty*, J., dissenting), that the delivery to the clerk was, under the circumstances, a

their own affairs), and such skill as the depositary has; or, in other words, the depositary is bound to take the same care of the deposit as a *reasonable*, prudent, and careful man might fairly be expected to take of his own property of the like description. (3)

This *reasonable* care and diligence is by some technically described as *slight*. To render a gratuitous bailee legally liable, he must be guilty of what the law calls *gross neglect*. A better term would, I think, be *actionable* neglect. (See *ante*, p. 17, Chapter I., Introductory; Section III., Degrees of Care and Neglect.)

"As to the first sort [*depositum*], where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a *common neglect* make him chargeable; but he must be guilty of some *gross neglect*" (*Coggs* v. *Bernard* (1704), Ld. Raym., 909, at p. 913: *Holt*, C.J.).

N.B.—The phrase "common neglect" in the above extract is, in the opinion of the writer, quite as equivocal as "ordinary neglect."

"Being a bailee without reward, the depositary is bound, of course, upon the principles already stated in the introductory chapter, to *slight diligence* only; and he is not, therefore, answerable, except for *gross neglect*. But in every case, good faith

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delivery to the defendants themselves, and the inference from the facts was that they undertook to use reasonable care and diligence in collecting these notes. *Per Draper*, C.J.: "Here the facts are, that on the demand of the defendants, and in compliance with the direction of the judge, the plaintiff delivered to the clerk of the county court the securities in question for the use of the defendants, and to be collected by them and the proceeds to be applied as above stated. I think a promise is to be implied from these facts, and, consequently, that the duty alleged also arises as the declaration states. If, in the case where goods are delivered to a party who is to do something about them *gratis*, the owners merely trusting them with him, is a sufficient consideration to make it his duty to take proper care or make proper use of them, *à fortiori*, when the delivery is made in order that the bailee may derive an advantage, though it enures also to the benefit of the bailor, it must create a sufficient consideration on which to found the duty or the implied promise" (*Hall* v. *Moss*, 25 U. C. Q. B. 263).

(3) In *Palin* v. *Reid*, 10 O. A. R., (*post*), it was said by *Hagarty*, C.J.: "That when a bailment is for benefit of bailor alone, liability can only arise from actual clear negligence"; and by *Burton*, J.A.: "There is no case which puts the duty of a gratuitous bailee higher than this, that he is bound to take the same care of the property as a reasonably prudent and careful man may fairly be expected to take of his own." See also remarks of *Harrison*, C.J., in *Holmes* v. *Thompson*, *ante*, p. 19.

requires that he should take *reasonable care* of the deposit; and what is *reasonable care* must materially depend upon the nature, value, and quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence, and particular dealings of the parties" (Story, s. 62).

"The general rule, then, being that the depositary is bound to *reasonable care*, proportioned indeed to the nature and value of the article, and the danger of loss, and the measure of that care being *slight* diligence, the result is that he is generally liable for *gross* negligence only" (*ibid.*, s. 79).

Story says in the last paragraph cited, that a gratuitous bailee is bound to "*slight* diligence" only, and in s. 16 he says: "Low or *slight* diligence is that which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns"; but would *slight* diligence as so defined be *reasonable* diligence in some cases? Suppose, for instance, a packet of exceedingly valuable diamonds was gratuitously entrusted to a person, would it be enough for him to take but *slight* care of them? Would he not be bound to take the same care of them as if they were his own? And who, if he were a person of common prudence, would not take *very great care indeed* of such a precious packet? I think the technical expressions *slight* diligence and *gross* neglect are apt to mislead a jury, and to be troublesome at times to lawyers also; as the following pages will show.

Story says (ss. 77, 78), in dealing with *Bonion's Case*, *ante*, p. 54, that three propositions may be deduced from the comments of Lord *Holt*, in the case of *Coggs* v. *Bernard*, viz.:

"(1) If the bailee knew that the box or casket contained jewels, although the bailor took away the key, he would be bound *to a degree of diligence proportioned to the value of the contents*. In other words, the same degree of care which would ordinarily be required to be taken of such valuables, when deposited, would be exacted of him."

In support of this proposition he refers to Jones on Bailments, 38, 39. Now, Sir *William Jones* there says: "Diamonds, gold, and precious trinkets, ought, *from their nature*, to be kept with peculiar care under lock and key; it would therefore be *gross* negligence in a depositary to leave such a deposit in an open antechamber, and *ordinary* neglect, at least, to let them remain on his table, where they might tempt his servants; but no man can proportion his care to the nature of things without knowing them; perhaps, therefore, it would be no more than *slight* neglect to leave out of a drawer a box or casket which was neither known nor could justly be suspected to contain diamonds."

Upon this last remark I would submit that a *casket*, which every one knows is a small box for holding jewels, might surely be suspected or presumed to contain precious stones, including diamonds.

Sir *William Jones*, it is to be noted, says that diamonds, gold, and precious trinkets ought from their nature to be kept with *peculiar care* by the depositary ; yet this is hardly consistent with his statement on p. 10 : "*If the bailor only receive benefit or convenience from the bailment*, it would be hard and unjust to require *any particular trouble* from the bailee, who ought not to be molested unnecessarily for his obliging conduct" ; nor with *Story's* remark in s. 23 : "When the bailment is for the sole benefit of the bailor, the law requires only *slight* diligence on the part of the bailee," and in s. 79, "the measure of that care being *slight* diligence." Proposition (1) really only amounts to saying that *reasonable care* —not necessarily *slight* care—should be taken ; *e.g.*, if burglars are known to be about, *great* care would be required.

Story's second proposition is : "(2) If he had no ground to suppose that the box or casket contained any valuables whatsoever, he would be bound only to such *reasonable* care as would be required of depositaries in cases of articles of common value. And under such circumstances, if he were guilty of gross negligence, he would be held responsible for the loss, at least to the extent of what he might fairly presume to be the value of the contents."

This proposition seems to be unexceptionable, if it is assumed that the box or *casket* was apparently made of common materials, *e.g.*, wood, and not of any precious materials. His third proposition is :—

"(3) If, on the other hand, there was a meditated concealment of the contents of the box or casket from the bailee, with a view to induce him to receive the bailment, and he would not have received it, or have exposed it, as he did, if he had been made acquainted with the facts, then the transaction would be deemed a fraud upon him ; or, at least, the loss would be deemed one occasioned by the bailor's own folly or *laches* ; and the bailee would not, even in a case of gross negligence, be responsible beyond the value of the box or casket itself, without the contents."

"This last proposition," says *Story*, "seems established by the prevailing doctrine in respect to *carriers*, who give notices, and thereby limit their responsibility, when packages are entrusted to them, the contents of which are unknown or concealed." With all due respect to *Story*, I would remark that such carriers are bailees *for reward* and not *gratuitous* bailees. Gratuitous bailees

do not give notices like carriers, and in cases of common carriers, where there is no notice, the better opinion, says *Story* (s. 567), seems to be that the party who sends the goods is not bound to disclose their value, *unless he is asked*.

The third proposition is, I think, established on two grounds: first, that there was no *consensus ad idem* to make the bailment a binding one; and secondly that there was concealment or fraud. Suppression of the truth or misrepresentation of a material fact will vitiate any contract (*Prideaux* v. *Lonsdale* (1863), 4 Giff. 159: *Stuart*, V.C.).

However, *Story* himself proceeds to give the real grounds in s. 78, as follows:

"No person has a right, by practising concealment or fraud, to impose a duty upon another which he would not knowingly have undertaken. On the other hand, no person, knowing, or having reason to presume, the contents of a box to be of very high and tempting value, has a right to excuse himself from a just responsibility, because the contents have not been formally communicated to him, and a request formally made that he will undertake the custody of the whole; since he may naturally presume that such is the intention of the depositor, notwithstanding the security of a lock or seal; and good faith requires him, under such circumstances, not to disappoint the just confidence of the party. But if he has no reason to suppose the contents to be of more than ordinary value, and there is nothing communicated which calls for *superior* vigilance [note, he does not say here "*slight* diligence"], then he may fairly discharge himself by such care as belongs ordinarily to trusts of that sort."

Gross Negligence.

The various ways in which the expression "gross negligence" has been explained and defined by the courts and judges may be gathered from the following cases and excerpts, where it will be found that it is said to be:

(*a*) The failure to exercise *reasonable* care, skill, and diligence;

(*b*) The absence of *ordinary* care;

(*c*) The failure to perform an undertaken duty;

(*d*) The failure on the part of a gratuitous bailee to exercise the degree of skill which he possesses (this, of course, might be of the very highest sort of skill or the very lowest);

(*e*) A short and convenient mode of describing the degree of responsibility which attaches upon a gratuitous bailee and which practically differs according to circumstances;

(*f*) The absence of such care as a reasonably prudent and careful man might fairly be expected to take of his own property of the like description.

See also *ante*, p. 21, Chapter I., Introductory, Section III., Degrees of Care and Neglect.

1. The plaintiff, who was owner of a *carton*, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or redeliver it safe, and without any agreement for a reward. The painting was upon paper pasted on canvas, and it was kept by the defendant in a room next to a stable, in which there was a wall that had made the carton damp and peel. The court agreed that in this case of a simple *depositum* without a reward, the law raises only a promise not *grossly* to neglect or abuse the deposit (*Mytton* v. *Cock* (1739), 2 Stra. 1099).

2. "The counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable, except in the case of *gross negligence*. . . . The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public-house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a *primâ facie* case of *gross negligence*, which required an answer on the defendant's part. The phrase 'gross negligence' means nothing more than a great and aggravated degree of negligence as distinguished from negligence of a lower degree" (*Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at pp. 260, 261, 262: *Taunton*, J.).

3. "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it" (*Wilson* v. *Brett* (1843), 11 M. & W. 113, at p. 115: *Parke*, B.).

4. "The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise *reasonable care*, skill and diligence is *gross negligence*. What is reasonable varies in the case of a

gratuitous bailee and that of a bailee for hire. (4) *From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has*" (*Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, at pp. 341, 342 : *Crompton*, J., delivering the judgment of the Exchequer Chamber (*Cockburn*, C.J., *Wightman*, *Crompton*, *Willes*, *Byles*, and *Keating*, JJ.)).

5. "A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence" (*Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, at p. 612 : *Willes*, J.).

6. "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees" (*ibid.*, at p. 614 : *Montague Smith*, J.).

7. "Any negligence is *gross* in one who undertakes a duty, and fails to perform it. The term 'gross negligence' is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses" (*Lord* v. *Midland Rail Co.* (1867), L. R. 2 C. P. 339, at p. 344 : *Willes*, J.).

8. "From the time of Lord *Holt's* celebrated judgment in *Coggs* v. *Bernard* (1704), Ld. Raym. 909, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called 'gross negligence.' This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. . . . As there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been

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(4) Where the plaintiff declared in a case charging the defendant with taking his mare on loan, and averring a breach of duty in not using her in a proper and careful manner, whereby she was injured and died, and the defendant pleaded that he obtained the mare from the plaintiff on a contract, for hire and not on loan, the plea was held a good answer (*Robertson* v. *Brown*, 1 U. C. Q. B. 345).

This case is interesting, inasmuch as it is the first declaration of the distinction between a contract for loan and a contract for hire. In the former, *Jones*, J., holding in accordance with English authority that the borrower was liable for *slight* negligence, and in the latter that the hirer would not be so liable.

sanctioned by such high authority as Lord *Holt*, and Sir *William Jones* in his Essay on the Law of Bailments. . . .

"The epithet 'gross,' is certainly not without its significance. The negligence for which, according to Lord *Holt*, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable" (*Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317, at pp. 336, 337: Lord *Chelmsford* delivering the judgment of the Judicial Committee). (5)

"The defendant's evidence added to the plaintiff's case the important fact, that in the strong room in which the plaintiff's debentures were kept there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that *he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description*. This was in effect the question left to the jury in *Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at p. 258, where Lord *Denman* told them that 'it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and, he added, that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence'" (*ibid.*, at p. 339).

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(5) "The negligence for which a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight, or mistake of judgment, but from some culpable default." (*Per* Sir *William Young*, adopting the language of Lord *Chelmsford*, in *Giblin* v. *McMullen*, 2 L. R. C. P. 336 (*Harris* v. *Sheffield*, 1 Russell & Chesley (N.S.) 1).)

Exception to Depositary's Ordinary Duty and Responsibility.

There is one important exception to the ordinary duty and responsibility exacted from a depositary, and that is where there is a *special agreement or contract* to answer for a want of more than reasonable care, that is, for a less negligence than what the law calls "gross negligence." For instance, the bailee may say that "No matter what happens I will *insure* the safety of these goods." Again, the bailee may say, "You may deposit your goods here, but understand you do so entirely at your own risk, as I cannot undertake to take reasonable, or in fact any, care whatsoever of them." In such cases the duty and responsibility would depend upon the nature of the depositary's special agreement or contract. The next authority affords an illustration of such exception, and both the subjoined are authorities for the above statement of the law :

"For according to *Southcote's Case*, 4 Co. 83, 84, the case of *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, and several other cases, if the goods were delivered to be kept *safely*, though the defendant had been robbed of them, detinue will lie against him, for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the defendant to take care of them as his own proper goods, &c., if he be robbed of them, that is a good plea" (*Kettle* v. *Bromsall* (1738), Willes 118, at p. 121 ; *Willes*, L.C.J., giving the opinion of the court).

Where there is a special contract the obligation of the depositary cannot be carried further than the language of the contract will warrant, and the intention of the parties must be found from the language used (*Trefitz* v. *Canelli* (1872), L. R. 4 P. C. 277).

Sir *William Jones* gives another exception to the usual rules as to a bailee's responsibility. He says at p. 48, "When a man spontaneously and officiously proposes to keep the goods of another, *he may prevent the owner from intrusting them with a person of more approved vigilance.*"

The incorporation of this exception into our law ought not readily to be admitted—as *Story* says (s. 82), and adds—"a voluntary offer of kindness to a friend, even when importunately urged, ought hardly to carry with it such penal consequences [that the depositary is liable for losses] ; since it is generally the result of strong affection, and a desire to oblige, and often a sense of duty, especially in cases of imminent peril or sudden emergency. The reason assigned for the rule is not satisfactory."

Bailee's Interference with Deposit and its Consequences.

The plaintiff came on board the *Arundel*, of which the defendant was captain, at Trinidad, with intent to work his passage home, but

being casually on shore at the time when the convoy made signal for sailing, was left behind. The plaintiff's box was stowed along with others on the quarter-deck, and soon after the departure of the vessel was opened by the defendant, upon a suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down ; as soon as the contents (doubloons, dollars, and other valuables) had been ascertained the lid was replaced and nailed down again with two large nails. Towards the termination of the voyage the captain again opened the box in the presence of several passengers, and the contents having been put into a canvas bag were deposited in the captain's trunk in the cabin, in which his own valuables were usually kept. When the vessel arrived at Gravesend, a river pilot was taken on board, and the captain and one mate left the vessel, another mate remaining on board ; an excise officer was also on board, and two young men belonging to the vessel were allowed to sleep in the cabin. On the next morning the captain's trunk containing the valuables was missing, and was not afterwards discovered.

" Every person who delivers goods to another to be carried for hire has a right to the utmost care ; the carrier stands in the situation of an insurer, and is liable for all losses except those which are occasioned by the act of God or of the King's enemies, and where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the captain, from motives of prudence, opened the box, he was bound to intermeddle so as to replace it in its former state of security, and to restore all the guards with which it had before been protected. In this case the defendant by his conduct exposed the property to peril and risk, and the value of the property imposed upon him an enhanced duty of vigilance, that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property it was a duty imperative upon him to restore it to at least its former degree of security. Now what was done in this case ? As they approached the land, the property was taken out of the box and put into a canvas bag. When the defendant had taken it wholly out of the box he was bound to make his own trunk in which it was deposited as secure as possible. It was no longer the box of a seaman working his passage home, but ascertained to be an article of great value, which the defendant was therefore bound to watch with great care and diligence " (*Nelson* v. *Macintosh* (1816), 1 Stark. 237, at pp. 238, 239 : Lord *Ellenborough*).

" If a bailee elects to deal with the property entrusted to him in

a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis* v. *Garrett* (1830), 6 Bing. 716" (*Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510, at p. 511: *Grove*, J.).

Necessary Deposits.

A necessary deposit is such as is made by the party upon some sudden emergency, and from some pressing necessity, *e.g.*, in case of a fire, a shipwreck, or other overwhelming calamity (see Section II., (b), *ante*, p. 52). Sir *William Jones* can hardly persuade himself that more than perfect *good faith* is demanded in this case, "although a violation of that faith be certainly more criminal than in other cases" (p. 49).

Story says, "In respect to cases of necessary deposits, that is, such as are suddenly and almost involuntarily made by the depositor, in cases of extraordinary peril and difficulty, such as in cases of fire, shipwreck, inundations, insurrections, attacks by mobs, and other casualties and pressing emergencies, our law does not seem to vary the responsibility of the bailee from that which arises under ordinary circumstances . . . Our law contents itself with an ample compensation for the actual injury or loss, leaving the additional moral infamy which attaches to cases of extraordinary perfidy, to be punished by the severe judgment of public disgrace, which inevitably follows it" (s. 83).

There seems to be no English decision upon the duty and responsibility of a depositary where the deposit is a necessary one.

Involuntary Deposits.

Story (s. 83a) gives as instances of involuntary deposits the following: Lumber floating in a river by a sudden flood or freshet lodged on the land of a stranger, and left there by the subsidence of the stream; trees blown by a tempest upon the land of a stranger; goods lodged in the like manner by a whirlwind or tornado in a distant field of a stranger. What, he says, is the duty of the owner of the land in all such cases, as to the protection or preservation of the property, does not appear to be settled by any distinct decisions of the common law. But some curious questions—he adds—have recently arisen as to the rights of the owner of lumber, or trees or other goods. May he lawfully enter upon the land, and reclaim and retake his property, doing as little damage to the herbage or soil as possible? or is he bound to ask leave of the owner? May the latter lawfully refuse such leave? or will a refusal to give such leave amount to a conversion of the property? If the owner suffers

the goods to remain without any effort to remove them, will it amount to a trespass or other ground of action? . . . There seems—he proceeds—to be strong reason to hold, that, where the goods of any person have, by an unavoidable casualty or accident, been lodged upon another's land, the owner may lawfully enter and take them away, doing as little damage as he may. . . . In respect—he concludes—to the duty of the owner of the land to preserve the property thus by accident thrown upon the land, it would probably be held, that it was of the same nature and extent as that of an ordinary finder of goods.

The following extract from the judgment of Chief Justice *Tindal* touches upon some of the last mentioned topics:

The Natural Right of Recaption.

"And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbour, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken and the owner pursues to obtain possession, the principle is laid down by *Blackstone* (3 Comm. 4), who says, 'As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law'" (*Anthony* v. *Haney* (1832), 8 Bing. 186, at p. 192: *Tindal*, C.J.).

Knowledge and consent are necessary to constitute a person a bailee of goods sent to him.

An *involuntary* deposit, as we have seen (Section II. (b), *ante*, p. 52), may be without the assent or even the knowledge of the depositor, and a *voluntary* deposit arises from the consent and agreement of the parties. There is, however, the case—rather a common

one now—of goods being sent by one party to another party without any authority whatever of the latter, *e.g.*, by advertising and pushing tradesmen; by ostensibly charitable persons; by the needy; by dishonest persons. It has been decided that parties cannot be considered as bailees of the property sent to them without their consent, and consequently there is no duty of any sort or kind cast upon such involuntary recipients with regard to what is so sent. The next two cases support the above views: (6)

"The defendant could not, without his knowledge and consent, be considered as a bailee of the property (a picture). In some instances it had happened that property of much greater value than that in the present case had been left at gentlemen's houses by mistake, in such cases the parties could not be considered as bailees of the property without their consent" (*Lethbridge* v. *Phillips* (1819), 2 Stark. 544, at p. 545: *Abbott*, L.C.J.).

If a person chooses voluntarily to send to another what the latter never asked for, no duty of any sort or kind is cast upon the latter with regard to what was so sent (*Howard* v. *Harris* (1884), 1 Cab. & El. 253: *Williams*, J.).

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(6) "The common law, independently of contract, imposes no duty upon a person to take care of another's property which may happen to come into his possession, but it will not permit him to do an act whereby it is injured. In legal phraseology he is not liable for nonfeasance but he is for misfeasance" (*per Duff*, J., delivering judgment of the court). In this case the defendant was master of the "Francis Herbert," chartered by McK. to carry a load of deals from Saint John to Dublin. McK. purchased the deals from J. and B., and employed them to deliver the same alongside the vessel. McK. paid J. and B. for the scowage, and then charged the vessel with the amount so paid for scowage. J. and B. borrowed a scow from the plaintiffs, which they left loaded with deals alongside the "Francis Herbert," and fastened to her as directed by the mate. The next morning the scow was missing. The plaintiffs did not offer any evidence to show how the scow was lost, and there was no evidence of misfeasance on the part of the defendant:—*Held*, that the relation of bailor and bailee did not exist between the plaintiffs and defendant, and in the absence of any evidence of misfeasance on the part of the defendant, he was not liable (*Wetmore* v. *McKenzie*, 1 S. C. N. B. R. 557).

Defendant conveyed all his property to trustees for the benefit of his creditors—certain goods of which the trustees had no knowledge remained in his possession:—*Held*, that the general property in the goods passed to the trustees, and that defendant could not be considered as holding the goods as their bailee (*McIntosh* v. *Hastings*, N. B. R. 6 All. 234).

SECTION IV.

FINDER.

Finder's Duty.

A finder ought to exercise *reasonable diligence* in preserving the goods he has found and taken charge of. Of course a finder is not bound at law to take charge of goods which he finds.

"There is also another kind of deposit which may, for distinction's sake, be called a *quasi* deposit, which is governed by the same general rule as common deposits. It is where a party comes lawfully to the possession of another person's property by finding it. Under such circumstances, the finder seems bound to the same reasonable care of it as any voluntary depositary *ex contractû*. St. Germain says: 'If a man finds goods of another, if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged': Doctor and Student, Dial. 2, ch. 38" (Story, s. 85).

"So if goods are deposited with a friend, and are stolen from him no action will lie (29 Ass. 28). But there will be a difference in that case upon the evidence; how the matter appears; if they were stolen by reason of a *gross neglect* in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doctor and Student, 129, upon that difference. The same difference is when he comes to goods by finding: Doctor and Student, *ubi supra*, Ow. 141" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909: *Gould*, J.).

"If a man finds goods, an action upon the case lieth for his ill and negligent keeping of them, but no trover and conversion, because this is but a nonfesans" (*Isaack* v. *Clark* (1614), Buls. 306, at p. 312: *Coke*, C.J.).

Story says of the above declaration of the law (s. 87): "This seems to be the true doctrine of the law; for, although a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner; yet, when he does undertake the custody, he ought to exercise *reasonable diligence* in preserving the goods. And the least degree of care known to our law, that is, slight diligence, may well be required of him, being that which is applied to gratuitous acts of kindness."

Larceny by Finder.

If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriate

them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. The above rules appear to be the result of the authorities following.

1. "The old rule (3 Inst. 108), that 'if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny,' has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny (Russell on Crimes, 102). Under this head fall the cases where the finder of a pocket-book with bank notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman who abstracts the contents of a parcel which has been left in his coach by a passenger (*Wynne's Case* (1786), Leach, C. C. 413; 2 East, P. C. 664), whom he could easily ascertain; or a tailor who finds, and applies to his own use, a pocket-book in a coat sent to him to repair by a customer, whom he must know (*Cartwright* v. *Green* (1803), 8 Ves. 405): all these have been held to be cases of larceny; and the present—the purchase at a public auction of a bureau in which the purchaser afterwards discovered a purse in a secret drawer—is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass: and it seems also from *Wynne's Case* ((1786), Leach, C. C. 413; 2 East, P. C. 664) that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and *open* the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny" (*Merry* v. *Green* (1841), 7 M. & W. 623, at pp. 631, 632: *Parke*, B.). As to the last sentence, see *R.* v. *Ashwell* (1885), 16 Q. B. D. 190, and *R.* v. *Flowers* (1886), 16 Q. B. D. 643.

2. "The result of these authorities (*Merry* v. *Green* (1841), 7 M. & W. 623, and others) is, that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appro-

priate them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it when he took complete possession of it *animo furandi*. The mere taking of it up to look at it would not be a taking possession of the chattel" (*R.* v. *Wood* (a mistake for *Thurborn*) (1849), 3 Cox C. C. 453, at pp. 458, 459: *Parke*, B., delivering the judgment of the Court. And see *R.* v. *Thurborn* (1849), 1 Den. C. C. 387).

3. "I think that we are bound by the decision of *R.* v. *Thurborn*, *supra*, which we act upon and adopt" (*R.* v. *Christopher* (1858), 28 L. J. M. C. 35, at p. 36: *Pollock*, C.B.).

4. "In all cases of lost property, the question turns on what were the prisoner's grounds for believing that the goods were abandoned. . . . The case falls within the rule laid down in *R.* v. *Thurborn*, *supra*, by which decision we are bound" (*R.* v. *Glyde* (1868), L. R. 1 C. C. R. 139, at p. 144: *Cockburn*, C.J.).

5. "I very much doubt whether the principles laid down in *Thurborn's Case* are right: but, as in *R.* v. *Christopher*, *supra*, so also in this case, we are bound by it" (*ibid.*: *Martin*, B.).

6. "I am not prepared to say that *Thurborn's Case* is not law. At all events, it stands unreversed; and we are bound by it" (*ibid.*: *Blackburn*, J.).

Finder's Property in Goods Found.

A finder of property in a *public* place, though he does not by such finding acquire an absolute property or ownership in the goods found, has such a property as will enable him to keep them against all but the rightful owner.

There can be no finder of property on *private* premises, as the presumption is that the possession of all property on private premises is in the legal possessor of the premises.

There is very little authority on this matter. The following extracts will be found useful as establishing the above propositions and the general right of property of the finder to goods and chattels lost.

1. "The general right of the finder to any article which has been lost as against all the world except the true owner was established in the case of *Armory* v. *Delamirie* (1722), 1 Stra. 505, which has never been disputed" (*Bridges* v. *Hawkesworth* (1851), 21 L. J. Q. B. 75, at p. 77 : *Patteson*, J.).

2. "The case of *Bridges* v. *Hawkesworth* ((1851), 21 L. J. Q. B. 75) stands by itself, and on special grounds ; and on those grounds it seems to me that the decision in that case was right. Some one had accidentally dropped a bundle of bank notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer [a traveller ?] picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by *Patteson*, J., that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or 'within the protection of his house.'

"It is somewhat strange that there is no more direct authority on the question ; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*" (*South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44, at p. 47 : Lord *Russell of Killowen*, C.J.).

3. "The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges* v. *Hawkesworth* (1851), 21 L. J. Q. B. 75, is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41. 'The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent

to exclude unauthorised interference.' That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea—into a place, in fact, of which it could not be said that any one had a real *de facto* possession, or a general power and intent to exclude unauthorised interference" (*id.*, at p. 46, 47.)

4. A man had been indicted for stealing sixteen hundredweight of iron, probably dropped out of some barge, from the Glamorganshire Canal Navigation [the man was not in the employ of the canal company] while it was being cleaned and the water was out. In this case, *Pollock*, C.B., said that the iron was properly laid in the indictment as the property of the canal company, adding that, it was very much like the case of property left by a guest at an inn, and it is not known to whom it belongs. It is in the mean time in the custody of the landlord or person to whom it is delivered for use of the true owner, and he held that the company had a sufficient property in the iron to justify the laying the property in them (*R.* v. *Rowe* (1859), Bell's C. C. 93). The principle of this decision was applied by *Chitty*, J., in the case of *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562; see also *R.* v. *Pierce* (1852), 6 Cox, C. C. 117.

As to property left in hackney and stage carriages, see 16 & 17 Vict. c. 33 (The London Hackney Carriage Act, 1853), s. 11, and 32 & 33 Vict. c. 115 (The Metropolitan Public Carriage Act, 1869), ss. 9 (5) and 10.

SECTION V.

POSSESSORY INTEREST AND RIGHT OF ACTION OF DEPOSITARY.

The general bailee has unquestionably a *limited property* in the goods entrusted to his care (Year B. 21 Hen. 7, 14 b, 15 a; *Jones*, p. 80; see *ante*, Chapter I., Introductory, Section VII., p. 38, *et seq.*, Property in goods and chattels.

Story considers that it is a matter of serious doubt whether a depositary has a special property in the goods deposited. In s. 93, he says, "It is often laid down in our books, that a depositary has a *special property* in the deposit. There is no doubt, that, in certain kinds of bailment, the bailee has a special property; but that he possesses it in the case of a mere deposit is a matter of serious doubt" and in s. 93 i, he says, "The true description of the right conferred on a naked bailee is that which Mr. Justice *Blackstone*, in the passage before cited (2 Bla. Com. 453, *ante*, p. 40),

calls a 'possessory interest,' or right of possession, in contradistinction to a general or special property." With the greatest respect to so eminent an authority as *Story*, I would submit that he has not given sufficient weight to the argument that, as against any person who cannot show a better title, the depositary has a *conclusive* title, both in our civil and criminal law. Surely, then, he has a special—not to say an absolute—*property* against all those who cannot show a better title. The word "property," says Lord *Langdale*, in *Jones* v. *Skinner* (1835), 5 L. J. Ch. 87 at p. 90, "is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of *every possible interest which the party can have*," and Lord *Halsbury*, L.C., in the recent case of *In re Prater* (1888), 37 Ch. D. 481, at p. 483, says that "the word 'property' is as wide as anything can be." Why then is not a 'possessory interest' property, and if property, why not *special* property? *Lopes*, L.J., in *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202, at p. 205, says he has great difficulty in seeing how a person can have a right to the immediate possession of a chattel without having some special property in it.

There is no doubt, too, that the possession of a depositary is a complete title against a *wrongdoer*. This is established by the cases next referred to.

"In an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels in which the plaintiff had a special property in such chattels" (see *Elliott* v. *Kemp* (1840), 7 M. & W. 306, at p. 312: *Parke*, B.; and *Jeffries* v. *Great Western Rail. Co.* (1856), 5 El. & Bl. 802, at p. 807: *Crompton*, J.; see *ante*, Chapter I., Introductory, Section VII. (b) p. 41; and also *Wilbraham* v. *Snow*, 2 Wms. Saunds. 1871, p. 96, note (*o*).

Right of Action of Depositary.

If a man delivers goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another without being able to resort to the original cause of that injury, and in amends there to do himself right (Bac. Abr., Bailment (D)).

The true doctrine would seem to be, that every bailee ought to have a general right of action against mere wrongdoers to the property, while in his possession, whether he has a special property

therein or not, because he is answerable over to the bailor (Story, s. 93, f). (7)

This doctrine is true also in English law, as the following cases, given in chronological order, show :—

1. "Here the plaintiff has *possession* under the rightful owner, and that is sufficient against a person having no colour of right. An agister, etc., a carrier, a factor, may bring trover: even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner" (*Sutton* v. *Buck* (1810), 2 Taunt. 302, at p. 309 : *Chambre*, J.).

2. A horse was the property of the plaintiff's brother, who sent it to him on the night before the accident. The plaintiff put it into his stable for a short time, and then turned it, after dark, into his close, where his own cattle usually grazed, and on the following

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Canadian Cases.

(7) In *Mason* v. *Morgan*, 24 U. C. Q. B. 328, it was held, affirming the judgment in *Blacklock* v. *Millikin*, 3 C. P. 34, that trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and then killed his mare, defendant not being present or aware of the act. *Per Hagarty*, J. : "The right of property in the animal killed is immaterial, as the plaintiff, in any event, could recover its value against a wrongdoer, although a mere bailee."

In *Irving* v. *Hagarman*, 22 U. C. Q. B. 545, *Hagarty*, J., in delivering judgment, said : "We have now to determine whether the plaintiff, having charge of Tinning's wood, of which he was the carrier, and in the absence of any proof as to the nature of his liability to him, or if such liability were in any way restricted, had not such a property in the goods as to entitle him to recover. The defendants have given us no evidence explanatory of the plaintiff's position in regard to Tinning. We simply know the plaintiff as the bailee of Tinning's goods lawfully in his charge as a carrier. I do not see my way to any other conclusion on this evidence, than that the plaintiff had such a possession and special property in the wood as to entitle him to recover its value against a wrongdoer." *Per Adam Wilson*, J. : "It is well settled that a gratuitous bailee may maintain an action for a trespass or an injury done to the property while in his bailment. There is no distinction between a bailee by land and a bailee by water."

When the plaintiff is in possession at the time of the taking he has a clear right, even without title shown, to maintain the action against the defendant, who was a mere wrongdoer (*Clarke* v. *Fullerton*, 2 Geldert & Oxley (N.S.) 348).

Plaintiff was entrusted with the possession of certain goods by the owner, who was about to leave the province, to be forwarded to him. With this intention the goods were sent to a wharf to be shipped by a vessel then lying there, but there was no formal delivery to the master or anyone on board. The defendant, who showed no justification, caused the goods to be taken and sold :—*Held*, that until the assent of the master of the vessel to receive the goods was shown, they remained in the possession of the plaintiff as special owner so as to enable him to maintain an action against a wrongdoer (*Sanford* v. *Bowles*, 3 Geldert & Oxley (N.S.) 304).

morning the horse was found dead in the close of the defendant, having fallen from the one to the other. The liability to repair was admitted.

"The plaintiff certainly was a gratuitous bailee, but as such, he owes it to the owner of the horse not to put it into a dangerous pasture; and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable: such liability is sufficient to enable the plaintiff to maintain this action; he has an interest in the integrity and safety of the animal, and may sue for a damage done to that interest" (*Rooth* v. *Wilson* (1817), 1 Barn. & Ald. 59, at pp. 61, 62: Lord *Ellenborough*, C.J.).

3. "The case which has been referred to (*Sutton* v. *Buck* (1810) 2 Taunt. 302) confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient *interest* to sue in trover" (*Burton* v. *Hughes* (1824), 2 Bing. 173, at p. 175: *Best*, C.J.).

4. "These actions [of trover] are maintainable upon a ground perfectly distinct from the right of property; they are maintainable upon the ground of possession. Any man in possession of goods, whether as the bailee or otherwise, may, in his own name, maintain an action. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff" (*Giles* v. *Grover* (1832), 6 Bli. (N.S.) 277, at pp. 452, 453: Lord *Tenterden*, C.J.).

5. "We are now to decide whether a wrongdoer in actual *possession* of goods, the property of a stranger, can recover their value in an action of trover against a wrongdoer who takes the goods from him. My impression has always been, like that of the rest of the court, that he can do so; but that is a question on which there has been considerable doubt, and which has never been expressly decided. I find that *Parke*, B., in delivering the considered judgment of the Court of Exchequer in *Elliott* v. *Kemp* (1840), 7 M. & W. 306, at p. 312, says: 'It is unnecessary, in this case, to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrongdoer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a *special property* in such chattels.' It is now

necessary to decide that point" (*Jeffries* v. *Great Western Rail. Co.* (1856), 5 El. & Bl. 802, at p. 807 : *Crompton*, J.).

Bailor or Bailee may maintain Trespass.

"*Gordon* v. *Harper* (1796), 7 T. R. 9, which must now be considered as settled law, shows, that if a person has an interest in goods for a *certain time*, by agreement with the owner, the latter during the time that he is not in possession, cannot maintain trover against a wrongdoer who takes the goods. That case might, with propriety, have been differently decided in the first instance ; but it has been followed by others, and the Court of Common Pleas somewhat extended the rule in *Bradley* v. *Copley* (1845), 1 C. B. 685. There it was held, that, where a person in possession of goods had an *uncertain interest* determinable by the owner, until that event happened, the owner could not maintain trover" (*Manders* v. *Williams* (1849), 4 Ex. 339, at p. 343 : *Parke*, B.).

"No proposition can be more clear, than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer ; the latter by virtue of his possession, the former by reason of his property. (8) This is laid down in 2 Roll. Abr., p. 551, pl. 22, 30 ; Com. Dig., 'Trespass' (B. 4), and in other authorities" (*id.*, pp. 344, 345).

Measure of Damages. (9)

"It has been contended that because the plaintiff was bailee of a horse to which an injury was done, while in his possession, by a third person, he is entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff as towards his bailor. The mere statement of that proposition is enough to show that it cannot be true. There are many cases, no doubt, where a bailee in possession of a chattel has recovered, against a stranger wrongfully taking it out of his possession or destroying it, the full value. This might well be the case if the bailee was liable over to the bailor, or if no one but the

Canadian Cases.

(8) The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stables there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall :—*Held*, that the plaintiff might maintain an action therefor (*Walker* v. *Sharpe*, 30 U. C. Q. B. 340).

(9) In an action of trover the general principle of law (though not an inflexible one) is that the jury can give no more in damages than the value of the goods at the time of the conversion (*Morton and McGhee* v. *McDowall*, 7 U. C. Q. B. 338).

bailee were in a position to sue. The cases that have been cited [*Jeffries* v. *Great Western Rail. Co.* (1856), 5 El. & Bl. 802; *Rooth* v. *Wilson* (1817), 1 Barn. & Ald. 59; *Croft* v. *Alison* (1821), 4 Barn. & Ald. 590; *Nicholls* v. *Bastard* (1835), 2 C. M. & R. 659] relate only to the right of a bailee to maintain an action; they have nothing to do with the measure of damages recoverable in such action. A physical interference with possession is a wrong for which undoubtedly a bailee may sue; but it is quite another thing to say that he may recover in such action the same damages as if he were the owner" (*Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, at p. 424: *Wills*, J.).

"The case of *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, which bears on this point, may possibly require at some future time further consideration" (*Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, at p. 394: *A. L. Smith*, L.J.).

SECTION VI.

DEPOSITARY'S RIGHT TO USE THE DEPOSIT.

Lord *Holt*, in *Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 917, says a "pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow., 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat."

Sir *William Jones*, at p. 80, says that the general bailee may not use the goods entrusted to his care on any account without the consent of the owner, either expressly given, if it can possibly be obtained, or at least strongly presumed; and this presumption varies, as the thing is likely to be better, or worse, or not at all affected by usage.

If a man delivers goods to another *to keep as a man would his own*; and this is called a *special bailment*, in which the bailee doth undertake for no more than for his diligence in the keeping of them, and has no manner of use of the thing to him committed, but the naked possession only (Bac. Abr., Bailment (A.)).

In general it may be laid down that the depositary has no right to use the thing deposited, unless there be an express or implied consent on the part of the depositor (Story, s. 89).

There are certain cases in which the use of the thing may be necessary for the due preservation of the deposit. There are others

where it would be mischievous ; and others again, where it would be, if not positively beneficial, at least indifferent (*id.*).

The best general rule on the subject (for every case must be governed by its own particular circumstances) is to consider, whether there may or may not be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed ; if to his injury, or perilous, it ought not to be presumed ; if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable (Story, s. 90).

SECTION VII.

RE-DELIVERY OF DEPOSIT AND DETERMINATION OF DEPOSIT.

As we have seen from the definitions of deposit (*ante*, Section I., p. 52), the goods or chattels must be re-delivered by the depositary according to the object of the deposit. Whenever, therefore, the gratuitous bailment is determined by the depositor demanding the goods or chattels back, it is the duty of the depositary to return them, and an action lies for their non-return.

"Clearly," says Sir *William Jones*, pp. 50, 51, "the obligation to *restore* a deposit flows from the nature and definition of this contract."

"A bailment of goods to be re-delivered imports an agreement to re-deliver ; all special bailments import a contract to re-deliver, when the purpose for which the goods were deposited is answered" (*Mills* v. *Graham* (1804), 1 Bos. & P. (N.R.) 140, at p. 145 : Sir *James Mansfield*, C.J.).

"There has been a question made, if I deliver goods to A. and in consideration thereof he promises to re-deliver them, if an action will lie for not re-delivering them ; and, in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and, according to that reversal, there was judgment afterwards entered for the defendant in the like case, (Yelv. 128). But those cases were grumbled at, and the reversal of that judgment in Yelv. 4 was said, by the judges, to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged, in 2 Cro. 667, Tr. 21, Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 920 : *Holt*, C.J.).

The depositary determines the bailment by acting inconsistently with the terms of the bailment.

"But it was held that the act of the bailee in doing a thing

entirely inconsistent with the terms of the bailmer gh not amounting to a destruction of the chattel, was a de ation of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover" (*Fenn* v. *Bittleston* (1851), 7 Ex. 152, at p. 159 : *Parke*, B.).

"This transaction amounted to a bailment to Frankenheim for a special purpose, which he did not carry out, and on failure of the trust the plaintiff's right to immediate possession accrued at once" (10) (*Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202, at p. 206 : *Lopes*, L.J.).

Increments.

The depositary is also bound to restore not only the thing deposited, but any increase or profits which may have accrued from it. (Story, s. 99. See also *post*, p. 126.)

Delivery to Joint Depositors.

A depositary should not deliver up the deposit to one of several joint bailors without the consent of the others.

If some of the joint bailors ask the depositary to keep the deposit, and the others desire him to return it, the depositary is not liable to an action at the suit of those who so ask for its return.

The above rules are established by the following authorities :

1. In *May* v. *Harvey* (1811), 13 East, 197, at p. 199, Lord *Ellenborough*, C.J., said, that it was clear that if the lease had been deposited by Bridge and Taylor, and the bailee had agreed to keep it for the two, it was not in the power of one of them (or of the assignees who represented that one) to take it out of his hands, without the consent of the other.

2. "Now, where several joint owners of a chattel deliver it to a third person, he may detain it until all the joint owners require him to return it. If some of them ask him to return it, and others desire him to keep it, the bailee is not liable to an action at the

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Canadian Cases.

(10) Trover is maintainable by the owner of property against the purchaser where a third party to whom the owner has given the use of the property, has sold it without authority. The rule is, that where there has been a misuser of the thing lent, there is an end of the bailment, and trover is maintainable (*Sibley* v. *Sibley*, 2 Geldert & Oxley (N.S.) 325).

Plaintiff drew and indorsed a bill of exchange, and delivered it to the defendants to discount, which they agreed to do if the bill was accepted. After acceptance the defendants refused to give the plaintiff either the proceeds or the bill, claiming the right to apply it to the payment of a debt which the plaintiff owed them :—*Held*, that the defendants were liable in trover for a conversion of the bill (*Landry* v. *Bank of Nova Scotia*, 29 N. B. S. C. R. 564).

suit of those who so ask for a return. If that were not so, each might have an action, and so the bailee might be harassed with as many actions as there were joint-owners. It seems to me to be perfectly clear, that, if two joint-owners of a chattel concur in depositing it with a third person, one alone cannot by demanding it entitle himself to bring detinue for it" (*Atwood* v. *Ernest* (1853), 13 C. B. 881, at p. 889 : *Maule*, J.).

3. Defendants held possession of and were entrusted with the custody of a box, containing bonds and securities, on the terms and undertaking by the defendants that they would *safely and securely* keep the same, and would not deliver up or part with the possession or custody thereof, except on the joint order or request of the plaintiffs.

"The defence in substance is, that the goods bailed by the plaintiffs have been delivered to one of them. It is said that this is no defence, because the contract of bailment was not to deliver them except to the plaintiffs jointly. But as, in fact, one of the plaintiffs has got the goods, the question arises whether he can sue the defendants for giving them to himself. It would be contrary to all principle, and the cases cited [*Jones* v. *Yates* (1829), 9 B. & C. 532 ; *Wallace* v. *Kelsall* (1840), 7 M. & W. 264, 273 ; *Smith* v. *Lovell* (1850), 10 C. B. 6, 23] clearly show that it would be contrary to all decisions if he could. I do not think an action at law could be maintained against bankers in this position more than against others ; but it is not to be supposed they could, therefore, with impunity deliver up to one securities deposited with them to hold for several. I think in such a case they would stand in the relation of trustees for all the joint bailors ; and there would be a clear remedy in equity for the breach of trust in delivering the joint property to one only of the *cestui que trusts*" (*Brandon* v. *Scott* (1857), 7 El. & Bl. 234, at pp. 236, 237 : Lord *Campbell*, C.J.).

Joint Depositaries.

It may happen that the depositary is a tenant in common, or a joint tenant with the other owners, one of whom may *destroy* or *misuse* the common property, or by some direct and positive act *exclude* the depositary from the common property. Should a case of the sort arise it will be as well to bear in mind the rules laid down in the following excerpts :

"It is settled that one joint tenant, tenant in common, or parcener, cannot maintain trover against his companion for a thing still in his possession, because the possession of one is the possession of both. . . . But if one joint tenant, tenant in common, or

parcener, *destroy* the thing in common, the other may bring trover (Co. Litt. 200 (*a*)). (11) . . . In all cases where one tenant in common *misuses* that which he has in common with another, he is answerable to the other in an action as for misfeasance" (Notes to Saunders' Reports (1871), vol. ii., pp. 111—116).

"The cases in which trover would lie against a tenant in common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights. There was the case of a ship being taken possession of by one tenant in common and sent to sea without the consent of his co-tenant. In that case (*Barnardiston* v. *Chapman* (1715), 4 East, 121) it was held that the property was destroyed by the act of one tenant in common, and, therefore, trover would lie in respect of the co-tenant's share. But where the act done by the tenant in common is right in itself, and nothing is done which destroys the benefit of the other co-tenant in common in the property, there no action will lie, because he can follow that property as long as it is in existence and not destroyed. If it is sold, another question arises under the statute of Anne (4 Anne, c. 3, s. 27)" (*Jacobs* v. *Seward* (1872), L. R. 5 H. L. 464, at pp. 474, 475 : Lord *Hatherley*, L.C.).

Place of Re-delivery.

"As to the place where restitution is to be made. If a particular place is agreed upon between the parties, that, of course, is to regulate the matter. If no place is agreed on, the property ought to be restored at the place where it is found, or where it ought to be kept. . . . It is difficult to lay down any general rule as to the place of restitution, other than this, that ordinarily it may be at the place of deposit, unless some other place is agreed upon, or is implied from the nature of the transaction. If the deposit is of a nature to be kept at the domicile of the depositary, that will

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Canadian Cases.

(11) A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale, or the co-owner is deprived of all beneficial interest (*Rourke* v. *Union Insurance Co.*, 23 S. C. R. 344, affirming Supreme Court of New Brunswick).

Where manuscript, the property of a partner, is placed in the hands of a firm for the purpose of publication in book form, the materials, *i.e.*, the whole book, printing, paper, etc., irrespective of the copyright or profit to be made on a sale of the work, belong to the firm, and it was held that the owner of the manuscript could not recover, as his co-partner had as much right to retain as the plaintiff to take it (*Doupe* v. *Stewart*, 28 U. C. Q. B. 192).

ordinarily be the place where it is to be restored, even when his domicile has been changed. But this, and indeed every other rule on the subject, must admit of exceptions. Much must depend upon the particular circumstances of the case and the presumed intention of the parties. It cannot, for instance, be presumed that a depositor could intend that, if the depositary removed to another country, he should carry the deposit with him; or, on the other hand, that if the depositary should remove to another street or town, he might not take the deposit with him and deliver it there" (Story, s. 117).

"Mr. Chancellor *Kent* has deduced from the cases the following general doctrine: that, where a bailee promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house or place of business, will be sufficient. This doctrine seems highly reasonable, and is supported by the cases which he cites, which are cases of a depositary of goods, who has received them as a bailee of a sheriff, or other ministerial officer" (*ibid.*, n. 1).

See also *Story*, s. 261, with regard to the several rules in regard to the place of re-delivery, and where he says that the common law seems not to have laid down any special rules on this subject.

SECTION VIII.

ACTION FOR THE RETURN OF DEPOSIT OR ITS VALUE, AND DAMAGES FOR ITS DETENTION.

A gratuitous bailment, as we have seen in the last section, may be determined by the depositor demanding the goods or chattels back, or by the failure of the depositary to carry out the special purpose of the bailment, whereupon the depositor's right to immediate possession accrues. On such right accruing, the depositor may bring an action for the return of the goods and chattels, or their value, and damages for detaining the same. (12)

Canadian Cases.

(12) A miller gave a warehouse receipt to a bank on some wheat, "and its product" stored in his mill for advances made to him, and died insolvent about two months after. During the period wheat was constantly going out of, and fresh wheat coming into, the mill. Just before his death the bank took possession and found a large shortage in the wheat, which had commenced shortly after the receipt had been given, and had continued to a greater or less extent all the time. Some of the wheat had been converted into flour,

The depositor, upon a refusal to restore the goods and chattels, or upon the conversion of them, or upon their unjust detention, used to resort to forms of action called *trover*, *conversion* and *detinue*. Though these forms no longer exist, their names are still used by the courts, and it is well to bear in mind what was meant by such names.

Formerly there existed a *form of action* called *trover* from the original form of the declaration, when it was applicable only to the case of goods lost and found, and converted by the finder to his own use. When this form of action was extended to all conversions of goods, whether ensuing upon a loss and finding or not, the averment of the loss and finding inserted in the count became fictitious (1 Chit. Pl., 7th edit., 163). The 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852), s. 49, abolished this fictitious averment, and the cause of action was afterwards, perhaps, more correctly designated by the real name of the injury, as a *conversion* of goods, which was the term adopted in the schedule to the Act (B., No. 28). Where the bailee determined the bailment by *any act inconsistent with it*, the bailor might at once have sued the bailee for a conversion. In order to maintain trover it was necessary that the plaintiff should have had either an *absolute or a special property in the goods* which were the subject of the action (see Bullen & Leake, 3rd edit., and the notes to *Wilbraham* v. *Snow* (1871), 2 Wms. Saund., p. 87). (13)

Again, an action lay for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for the damages occasioned by the wrongful

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Canadian Cases.

and it was held that the bank was entitled to the purchase money of the flour (*Re Goodfellow*, 19 O. R. 299). (See Bank Act, R. S. C. c. 120.)

Plaintiff gave two notes against Ford to the defendant, a division court clerk, to collect and to apply on a note of 300 dols., which the plaintiff owed to the defendant. The defendant sold the two notes to one M., guaranteeing their recovery, and M., having recovered judgment against Ford, but made nothing thereon, obtained back from the defendant what he had paid. Defendant transferred the note for 300 dols. to T., who sued the plaintiff thereon, and recovered judgment:—*Held*, that the plaintiff could recover from the defendant the money received by him from M. as money had and received, for the defendant had no authority to make the conditional transfer; and as Ford's notes were extinguished by the judgment recovered on them, and the holder of the plaintiff's note had recovered judgment against him, the defendant had rendered it impossible to restore the plaintiff to his original position (*Moorman* v. *Farmer*, 27 U. C. Q. B. 1).

(13) See *Gilpin* v. *Royal Canadian Bank*, 26 U. C. Q. B. 445, and 27 U. C. Q. B. 310, where authorities as to what amounts to a conversion are reviewed, and *Davis* v. *Brown*, 9 U. C. R. 201.

detainer (3 Bla. Com. 151). (14) The *form of action* adapted for suing for the wrongful detention of personal property was called *detinue*. The declaration in detinue formerly commenced with a statement either that the plaintiff had lost the goods and they had come to the possession of the defendant by finding, or that the plaintiff had delivered the goods to the defendant to be re-delivered to him on request; and the count was spoken of as *detinue sur trover* or *detinue sur bailment*, according to the form adopted. But these allegations, which were generally fictitious, were immaterial, and were not traversable, and after 15 & 16 Vict. c. 76 (Common Law Procedure Act, 1852), s. 49, they had to be omitted. (15) To support this action the plaintiff must have had the right to the *immediate possession* of the goods at the time of commencing the action, arising out of an absolute or a special property; an interest in reversion was not sufficient. The "detention" means that the defendant withholds the goods and prevents the plaintiff from having the possession of them. Where the goods have been re-delivered the jury may confine their assessment to the damages for the detention. (See Bullen & Leake, 3rd edit., and the notes to *Richards* v. *Hodges* (1871), 2 Wms. Saund., p. 271.)

By the Rules of the Supreme Court, O. 19, r. 4, every pleading shall contain, *and contain only*, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be.

Mr. W. Blake Odgers, in his Principles of Pleading, 1st ed., p. 116, says, that "forms of action are in fact abolished; it is now no longer necessary to state on the pleadings whether the plaintiff is suing in trespass or on the case, in detinue or in trover. This is a most important and most valuable alteration. Formerly everything turned on the form of action in which the plaintiff elected to sue."

Detinue by Bailee or Bailor.

If a bailee deliver the goods to another, there he shall have an action of detinue against him because he hath his possession, and

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Canadian Cases.

(14) Where an agent or holder disposes of a promissory note overdue without authority, though for good consideration, the person taking from him obtains no title as against the principal (*West* v. *MacInnes*, 23 U. C. Q. B. 357).

(15) "The old learning on the subject of conversion need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases, the real question is whether there has been such an unauthorised dealing with the plaintiff's property as has caused him damage, and, if so, to what extent has he sustained damage" (*per Boyd*, C. (*Stimson* v. *Block*, 11 O. R. 96)).

undertakes for the custody, and the original bailor may have his action against either of them, because in him is the property which both are bound to answer to him (Bac. Abr. tit. Bailment (D)). (16)

Goods to be Kept Safely—Goods to be taken care of as one's own proper goods.

"According to *Southcote's Case* (4 Co. 83, 84), the case of *Coggs* v. *Bernard* ((1704), 2 Ld. Raym. 909), and several other cases, if the goods were delivered *to be kept safely*, though the defendant had been *robbed* of them, detinue will lie against him; for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the defendant to take care of them *as his own proper goods*, etc., if he be *robbed* of them, that is a good plea" (*Kettle* v. *Bromsall* (1738), Willes, 118, at p. 121: *Willes*, C.J.).

Conversion.

A demand and refusal, when not met with any counter evidence, amounts to a conversion.

"A demand and refusal, when not met with any counter evidence, amounts to a conversion. Lord *Coke* says (10 Rep. 56), 'that if A. brings an action against B. upon *trover* and conversion of plate, jewels, etc., and the defendant pleads not guilty, now it is good evidence *primâ facie* to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused; and, therefore, it shall be presumed that he has converted them to his own use.' Here the note was bailed to the defendant, and his refusal to return it, on demand, was evidence whence the jury might find

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Canadian Cases.

(16) Money deposited in the hands of a stakeholder under a contract tainted with illegality can be recovered back by the depositor from the stakeholder, if notified, while it remained in his hands, not to pay it over (*Ryerson* v. *Derby*, 1 Russell & Chesley (N.S.) 13; see also *Doran* v. *Chambers*, 20 N. S. L. R. 309).

In *Logue* v. *McCuish*, 21 N. S. L. R. 75, the plaintiff deposited a watch with defendant, as stakeholder, to abide the result of a bet on the Dominion Elections. On the morning of election day plaintiff and the other party to the bet withdrew the bet, and sent a telegram to defendant to that effect, which defendant received before handing over the watch to the winner:—*Held*, that the notice of withdrawal was in time, and defendant was liable.

In *Sheldon* v. *Law*, 3 U. C. R. O. S. 85, *Robinson*, C.J., said: "*Primâ facie* every wager upon a horse race is illegal. Since 13 Geo. 2, c. 19, it is very clear that betting on a horse race, if the horses ran only for that wager and were not the property of the persons betting, is an illegal wager."

In *Battersby* v. *Odell*, 23 U. C. Q. B. 482, it was held, that where the transaction was illegal under statute 13 Geo. 2, the plaintiff can recover back his money from a stakeholder.

a conversion" (*Cranch* v. *White* (1835), 1 Bing. (N.C.) 414, at p. 418, 419 : *Tindal*, C.J.). (17)

There may be a qualified refusal which is no evidence of conversion.

"In an action of trover, where the demand of the things for which the action is brought, is not made by the plaintiff himself, who is the owner, but by another person on his account [*e.g.*, plaintiff's wife], and the defendant refuses to deliver them, on the ground that he does not know to whom the things belong, and therefore keeps them till that is ascertained : or that the person who applies is not properly empowered to receive them ; or until he is satisfied by what authority he applies, that shall not be deemed such a refusal as shall be evidence of a conversion sufficient to support this action" (*Solomons* v. *Dawes* (1794), 1 Esp. 83: Lord *Kenyon*). (18)

If A., into whose possession goods happen to come, being ignorant that B. is the real owner, refuses to deliver them to him till B. proves that he is so, this refusal is no evidence of a conversion to enable B. to maintain trover against A. for the goods. *Green* v. *Dunn*, 1811. Trover for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier. The plaintiff to whom the timber belonged having demanded it of the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else." Lord *Ellenborough* : "This is a qualified refusal and no evidence of conversion" (Note to *Maloney* v. *Bartley* (1812), 3 Camp., pp. 215, 216).

Any person having the right to immediate possession of goods and chattels which are wrongfully detained from him may bring an action of detinue. (19)

Canadian Cases.

(17) *West* v. *MacInnes* (*ante*, p. 85).

(18) A. lent a horse to B. for a special purpose, and while B. was using him consistent with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A., having seen the horse, refused to take him, and went to B.'s residence (twenty miles from where the horse was left), and demanded him back sound as received :—*Held*, that B.'s non-delivery of the horse after thus demanded did not furnish evidence of a conversion, and that A. could not maintain an action of trover for his value under the circumstances. *Per Robinson*, C.J. : A mere non-delivery by a bailee under circumstances which afford no evidence of a conversion, will not support trover (*Wells* v. *Crew*, U. C. Q. B. (O.S.) vol. v. 209).

(19) A. having stolen a horse, sells it to B., and is afterwards tried and convicted of the felony. Upon trover brought by owner against prisoner and purchaser :—*Held*, not a joint conversion, though the plaintiff might have

"I adhere to the statement made in the old books of practice, that detinue can be maintained by any person who has the immediate right to possession of personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or a special property. The decision in *Fenn* v. *Bittleston* ((1851), 7 Ex. 152) is a strong authority to show that the right to maintain detinue cannot be extended beyond that proposition" (*Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202, at p. 205: *Fry*, L.J.).

"The law of detinue, in my opinion, is that a person entitled to possession of a personal chattel can maintain the action when he has a right to immediate possession arising out of an absolute or special property in the chattel. I have great difficulty in seeing how a person can have a right to the immediate possession of a chattel without having some special property in it" (*ibid.*, *Lopes*, L.J.).

Negligent Dealing by a Bailee is not a Conversion.

"There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion. But where, as is the case

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Canadian Cases.

maintained his action against either of the defendants separately, and verdict for plaintiff upheld (*Edwards* v. *Kerr*, 13 U. C. C. P. 24).

Plaintiff, a merchant, having delivered cloth, etc., to be made up into coats, to a tailor who made up cloth, etc., for plaintiff and others, and was also in the habit of exhibiting for sale and selling clothes on his own account, and he having sold the coats made of plaintiff's cloth to defendant:—*Held*, that plaintiff was entitled to recover the coats from defendant (*Thompson* v. *Nelles*, 4 U. C. C. P. 399).

Any person who, however innocently obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion (*Driffill* v. *McFall*, 41 U. C. Q. B. 313).

It is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, if such conduct can be said to be inconsistent with the title of the true owner, is a conversion (*Moffatt* v. *Grand Trunk Railway*, 15 U. C. C. P. 392; *Coffer* v. *Quebec Bank*, 20 U. C. C. P. 110). See also *Wallace et al* v. *Swift et al*, 28 U. C. Q. B. 563 (*post*, p. 236).

here, there is no unlawful taking of possession, or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion, unless the bailee is a participator in the act which causes their destruction" (*Heald* v. *Carey* (1852), 11 C. B. 977, at p. 993 : *Maule*, J.). (20)

The Effect of a Judgment in Trover.

A judgment in trover without satisfaction does not change the property in the goods so as to vest them in the defendant ; with satisfaction it does. (21)

"There remains, however, an entirely different question, which arises upon the new assignment, and which is, whether a judgment in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of [that a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause, although such judgment be unsatisfied] ; because if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

"We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem* ; it is to recover *primâ facie* the value of the goods. It may be that the goods have been returned, and the judgment given

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Canadian Cases.

(20) The plaintiff sent to his agent J., two boxes of trees and roots made up up in bundles addressed to various purchasers. They went by steamer to defendant, a forwarder at Powell's landing, where they arrived on Saturday, May 5th, and were taken from the boxes by defendant, and some of them delivered to the persons to whom they were addressed, who called for them. On Wednesday a person was sent by J. to take and deliver them, and on Thursday J. himself called. Many of the trees were injured, and the evidence was contradictory as to the state in which they arrived, and as to whether the injury was caused by the defendant's treatment of them, or whether it was necessary, as he alleged, to open the boxes and deliver them without delay. The plaintiff having brought trover :—*Held*, that whether defendant had been guilty of negligence or not as a bailee, he had done nothing which in law would amount to a conversion (*Lovekin* v. *Podgor*, 24 U. C. Q. B. 156).

(21) "When trover is brought, the property is not changed until the recovery of judgment." (*Per Hagarty*, J., in *Gilpin* v. *Royal Canadian Bank*, 27 U. C. Q. B. 316.)

for nominal damages only. To say in such a case that the mere obtaining judgment vests the property in the defendant would be an absurdity. It is clear, therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the defendant is by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenk. 4th Cent. Case 88. Any other construction would seem to be absurd . . .

"There is a series of decisions showing that a mere recovery, without satisfaction, has not the effect of changing the property. In Jenk. 4th Cent. Case 88, it is said: 'A., in trespass against B. for taking an horse, recovers damages; by this recovery, *and execution done thereon*, the property of the horse is vested in B. *solutio pretii emptionis loco habetur*.' That doctrine is acted upon in *Cooper* v. *Shepherd* (1846), 3 C. B. 266; and though the marginal note treats the *recovery* as changing the property,—a doctrine thrown out also in the note to *Barnett* v. *Brandão* (1843), 6 M. & G. 630, at p. 640,—the plea shows that the damages were satisfied; and the judgment of *Tindal*, C.J., shows that the property vests in the defendant only 'on payment of the damages.' To the same effect are the observations of *Holroyd*, J., in *Morris* v. *Robinson* (1824), 3 B. & C. 196, at p. 206. 'Where in trover,' he says, 'the full value of the article has been recovered, it has been held, that the property is changed by judgment and satisfaction of damages. Unless the full amount is recovered, it would not bar even other actions in trover.' To the same effect is the note in 2 Wms. Saund. 47," n. (*z*). It may also be proper to refer to the note to the case of *Holmes* v. *Wilson* (1839), 10 Ad. & E. 503, at p. 511, in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgment for the plaintiff upon the new assignment" (*Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584, at pp. 587—590: *Willes*, J., delivering the judgment of the court (*Willes* and *Montague Smith*, JJ.)). See the same case in the Ex. Ch. L. R. 7 C. P. 547.

The above case was followed in *Ex parte Drake*, *In re Ware* (1877), 5 Ch. D. 866: *Jessel*, M.R., *James* and *Baggallay*, L.JJ.

See also Chapter IV. (Loans for Use), Section VI. (Right of Action of Lender), *post*, p. 127.

SECTION IX.

TITLE OF THIRD PERSON TO DEPOSIT.

The depositary sometimes finds himself in an embarrassing situation, due to the claim of some person, other than the depositor, to the goods or chattels deposited with him.

The following rules will be found useful in dealing with such cases, and they are well illustrated and established by the cases referred to immediately following them :

(*a*) Generally the depositary must re-deliver the goods or chattels to the depositor, or his authorised agent, or account to him for them. (22)

Canadian Cases.

(22) The plaintiff declared that one G. had deposited with the defendant certain wheat, and obtained from him a warehouse receipt therefor; that by the course of trade such receipt was transferable by endorsement, and the property in the wheat would pass to the endorsee; that G. sold such wheat to the plaintiff, and endorsed to him the receipt, but that when he presented it to the defendant the latter refused to deliver to him the wheat, pleading that before he had any notice or knowledge of such transfer or sale the wheat was taken out of his warehouse by G. :—*Held*, a good defence; for at common law the endorsement and transfer of the receipt would clearly not pass the property, and the Consolidated Statutes of Canada, c. 54, relied upon by the plaintiff, has no application to an absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted when the receipt is endorsed over. *Per Hagarty*, J. : "It is conceded that, at common law, a bailee receiving goods in store for the owner, and giving him a receipt acknowledging such fact, must be protected if he give up the goods to the owner on demand, in good faith, unaware of any sale or disposition of them by the bailor, and that the law would not impose upon the bailee any duty to insist, as a condition of such re-delivery, on the return of his receipt. This would seem to be the law, and the principle runs through all classes of bailments. Delivery to the original bailor, the only person known as owner or as having any title or interest, will be a good discharge. The plaintiff relies, however, on the statute, Consolidated Statutes of Canada, c. 54 (superseded, Consolidated Statutes of Canada, 1886, c. 120). I am of opinion that such statute does not affect any direct sale or purchase of property, but only to pledges, etc." (*Glass* v. *Whitney*, 22 U. C. Q. B. 290).

Defendant, being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund, out of which the "purses" run for were to be paid. The plaintiff entered horses and won "purses," but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made :—*Held*, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Per Morrison*, J.: "The mere fact that the money belongs to the plaintiff is not sufficient if defendant is accountable for it to another" (*Simms* v. *Denison*, 28 U. C. Q. B. 323). See *ante*, p. 12.

(*b*) The depositary has no better title than, and is generally estopped from denying, that of the depositor.

(*c*) The depositary has no defence against the rightful owner if other than the depositor.

(*d*) The depositary, in case of dispute, is not bound to ascertain who has the right to the goods and chattels; he may proceed by interpleader.

(*e*) The depositary can set up the title of a third person if he defends upon the right and title, and by the authority, of such third person. He, however, must not only allege such title, but he must prove it.

(*f*) The depositary is, in the absence of a special contract to the contrary, discharged from re-delivery if he has been evicted by title paramount, and if there has been no default on his part.

1. "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in the case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity (see now Order LVII.). But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title" (*Wilson* v. *Anderton* (1830), 1 Barn. & Ad. 450, at p. 456: Lord *Tenterden*, C.J.).

2. "Now, a lessee cannot dispute the title of his lessor at the time of the lease, but he may show that the lessor's title has been put an end to; and, therefore, in an action of covenant by the lessor a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain or bring an ejectment, by a person having good title, would be equivalent to an actual eviction. So here, if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, show that the plaintiff recovered the value of the goods, or that, on being threatened with an action by a person who had good title to the goods, he had delivered them to him" (*ibid.*, at p. 457: *Littledale*, J.). (23)

Canadian Cases.

(23) A bailee is justified in delivering the goods bailed to their rightful owner, and is not estopped from disputing the bailor's title. He can, therefore,

3. Trover for timber in the possession of defendant a as wharfinger, and sold to the plaintiff by one Ross. The defence was, that the timber belonged to one Allum, to whom it was alleged Ross had sold it before he sold it to the plaintiff. "This is an action of trover, in which I agree that the question is, whether the plaintiff can show the property to be in himself: as to which, in the present case, the defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted out from the law. The plaintiff is sent with an order to the defendant's wharf; the order is received, and the defendant says it is complied with. He afterwards tells his sawyers that the timber is not the property of Allum, but of the plaintiff; and ultimately sends the plaintiff certain charges, saying that those were the only charges in respect of his timber. The only question is, whether, after this, the defendant can set up the title of a third person, which is the less allowable, because, at the time he made the admissions, he was fully acquainted with the claim of Allum. The plaintiff having relied on those expressions, was entitled to suppose that the defendant kept the timber for him . . . the acts and words of the defendant here place him out of court as much as if he had made the admission in court" (*Gosling* v. *Birnie* (1831), 7 Bing. 339, at p. 343: *Tindal*, C.J.).

4. "We do not question the general rule that one who has received property from another as his bailee or agent or servant, must restore or account for that property to him from whom he received it. . . . But the bailee has no better title than the bailor, and consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him (*Wilson* v. *Anderton* (1830), 1 Barn. & Ad. 450. . . . Now, in the ordinary class of bailments, such as the present [an auctioneer, the defendant, who withheld the proceeds of sale of goods from the plaintiff and defended the action, relying on the right and by the authority of one Robbins and not hostilely to him], the representation is by the bailor to the bailee that he may safely accept the bailment; and, so far as any weight is to be given to the representation it makes against the estoppel. . . . The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from

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Canadian Cases.

properly plead the plea of "not possessed," and under it show that the plaintiffs had no legal title to the property. (*Burns*, J., in *White* v. *Brown*, 12 U. C. Q. B. 483.)

another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. (24) This was decided as early as the 44 Eliz. (1602) in *Shelbury* v. *Scotsford*, Yelv. (4th edit.) 23. There the plaintiff sued in assumpsit against the bailee of a horse for the breach of his contract to re-deliver it. The defendant pleaded that J. S., the true owner of the horse, took it from him. After verdict for the defendant, the plaintiff moved in arrest of judgment; 'but by Fenner and Yelverton, *contra*; for the matter alleged by the defendant does in law discharge the promise by reason of the former property of the horse in J. S.; and then it is an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants in any sort depending upon the interest.' In *Wilson* v. *Anderton* (1830), 1 Barn. & Ad. 450, at p. 457, *Littledale*, J. (without referring to *Shelbury* v. *Scotsford* (1602), Yelv. 23, but evidently having it in his mind,) states the law to the same effect. And accordingly in *Hardman* v. *Willcock*, note (*a*) to *White* v. *Bartlett* (1832), 9 Bing. 382; in *Cheesman* v. *Exall* (1851), 6 Ex. 341, and in *Sheridan* v. *The New Quay Co.* (1858), 4 C. B. (N.S.) 618, a bailee was permitted under circumstances similar to the present to set up the *jus tertii*. It is true that in the two first of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrongdoer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee

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Canadian Cases.

(24) When a bailee accepts a bailment and undertakes to re-deliver to his bailor, but is evicted by title paramount, he is not, unless there is a special contract, or he is in some way to blame for the loss, responsible to the bailor for injury suffered by the latter. (*Biddle* v. *Bond*, 6 B. & S. 225, followed; judgment (Court of Appeal, Ontario) affirmed.) *Per* Lord *MacNaghten*: "In bailments, such as that upon which the appellant founds his claim, the bailor represents to the bailee that he may safely accept the bailment. On this representation, the bailee promises to re-deliver. It is clear that the bailee, after acknowledging that he holds the goods in his hands on account of the bailor, cannot say to the bailor, 'The goods are not yours'; but it is equally clear that if there is that which amounts to eviction by title paramount, the bailee is discharged from his promise. In that event he is under no liability to the bailor, unless he has made a special contract with him, or is in some way to blame for his loss" (*Ross* v. *Edwards*, 11 R. 574).

may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford* ((1602), Yelv. 23) viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley* v. *Reed* (1843), 4 Q. B. 511, at pp. 517, 518, that 'to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever.' Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. We assent to what is said by *Pollock*, C.B., in *Thorne* v. *Tilbury* (1858), 3 H. & N., 534, at p. 537, that a bailee can set up the title of another only 'if he defends upon the right and title, and by the authority of' that person. Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences" (*Biddle* v. *Bond* (1865), 6 B. & S. 225, at pp. 231—234: *Blackburn*, J., delivering the judgment of the court (*Cockburn*, C.J., *Blackburn* and *Mellor*, JJ.)). (25)

5. "According to that decision [*Biddle* v. *Bond* (1865), 6 B. & S. 225], one who has received property from another as his bailee, agent or servant, must restore or account for that property to him from whom he received it, and it is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made upon him, so that he may be entitled to an interpleader. The estoppel, however, ceases when there is an eviction by title paramount" (*Leese* v. *Martin* (1873), L. R. 17 Eq. 224, at pp. 233, 234: Sir *Charles Hall*, V.C.).

6. "There [in *Biddle* v. *Bond* (1865), 6 B. & S. 225] the defendant employed an auctioneer to sell the goods, one Robbins

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Canadian Cases.

(25) "A person receiving money from an agent on a promise to return it to him, cannot, in an action by the agent to recover it back, set up as a defence that the money really belonged to a third party." *Per Robinson*, C.J.: "The confidence necessary for commercial transactions requires that a person receiving from another money or goods in deposit, or upon bailment for any purpose, shall not turn round upon him by whom the trust has been reposed, and put him to the proof of his title. There may be cases in which the plaintiff's right to recover might be withstood, but not upon a mere surmise or suspicion of this kind, nor for the purpose attempted here. No man could know he was safe in employing an agent if such a line of conduct were permitted" (*Lester* v. *Burnham*, 1 U. C. Q. B. 419).

A wrongdoer taking goods out of the possession of another cannot set up the *jus tertii* (*Williams* v. *Thomas*, 25 O. R. 536).

gave notice that the goods were his, and the court considered, as it seems to me, that if Robbins had not made a claim the defendant could have made no answer; but they said that as he had made a claim the defendant might set it up. Mr. Justice *Blackburn*, who delivered the judgment of the court, seems to me to put it carefully on the ground of the claim by Robbins, and to have adhered to the rule laid down in former cases, that you can only set up this right of a third person if you are defending upon the right and title, and by the authority of such third person" (*Kingsman* v. *Kingsman* 1880), (6 Q. B. D. 122, at p. 134: *Brett*, L.J.).

7. "I agree that as a general rule a bailee of goods cannot dispute the title of his bailor. There are, no doubt, cases in which goods have been taken from a bailee by a third party, who claimed them by title paramount, and, if there has been no fault on the part of the bailee, it has been held that this is a good excuse to him as against his bailor. An illustration of this is the old case of *Shelbury* v. *Scotsford* (1602), Yelv. 23, in which a stolen horse had been bailed by the thief, and had been forcibly taken away from the bailee by the rightful owner, and it was held that the thief could not maintain an action of trover for the value of the horse against the bailee, on the ground that the eviction of the horse out of his possession was a discharge in law of his promise to return it to his bailor. But, in order that the bailee may be able to avail himself of such a defence, he must himself have been in no default. If the bailee, knowing of the adverse claim, had said to his bailor, I will sell the horse for you if you will let me have a commission, and I will hand over the proceeds to you, he could not have afterwards set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open" (*Ex parte Davies* (1881), 19 Ch. D. 86, at p. 90: *Jessel*, M.R.).

8. "In my opinion, the law is laid down in *Biddle* v. *Bond* (1865), 6 B. & S. 225, by Lord *Blackburn*, in a considered judgment of the Court of Queen's Bench, delivered by a judge who knew more about these matters than any one else, and it is, I think, laid down there distinctly that, as between a bailee and his bailor under an ordinary contract of bailment, the bailee must, if he desires to defend an action for the non-delivery of the goods upon the demand of the bailor, show that he has already delivered them upon a delivery order authorised by the bailor, or he may ask for an interpleader order, or he may, at his own risk as regards the plaintiff, say, 'I defend the action on behalf of A. B., and I say that he is the person really entitled to the goods.' If he takes the latter course, he must not only allege the title of the

third party, but he must prove it; and, if he does not prove it, he has no defence. 'A bailee,' says Lord *Blackburn*, 'can set up the title of another only if he defends upon the right and title and by the authority of that person.' He must allege that title and must prove it. That is the law laid down, and it seems to me rightly laid down, in *Biddle* v. *Bond* (*supra*)" (*Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q. B. 318, at p. 325: Lord *Esher*, M.R.).

9. "In a bailment such as that upon which the appellant founds his claim, the bailor represents to the bailee that he may safely accept the bailment. On that representation the bailee promises to re-deliver. It is clear that the bailee, after acknowledging that he holds the goods on account of the bailor, cannot say to the bailor, 'The goods are not yours'; but it is equally clear that, if there is that which amounts to eviction by title paramount, the bailee is discharged from his promise. In that event he is under no liability to the bailor unless he has made a special contract with him or is in some way to blame for his loss (*Biddle* v. *Bond* (1865) 6 B. & S. 225)" (*Ross* v. *Edwards and Co.* (1895), 73 L. T. 100, at p. 101: Lord *Macnaghten*, delivering the judgment of the Judicial Committee).

SECTION X.

DEPOSITARY'S LIEN.

A court of common law for the last hundred years and more has gone as far as it could go towards enforcing payment to a depositary of his reasonable expenses as a recompense for his trouble incurred in and about the custody of the goods and chattels deposited with him. Perhaps, now that rules of equity prevail, a gratuitous bailee will be regarded in the light of a gratuitous trustee, who, though allowed nothing for his trouble, is allowed by the courts everything for his charges and expenses, properly incurred in the execution of the trust, and these expenses will be treated as a first charge or lien upon the deposit. By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24, a trustee may, without prejudice to the provisions of the instrument, if any, creating the trust, reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

It would seem from the subjoined cases, that at common law gratuitous bailees have no lien on the deposit for their trouble and expense incurred in and about the custody of the deposit, their remedy being by action.

"But this is not a case of damage-feasance; the timber is found lying upon the banks of the river, and is taken into the

possession and under the care of the defendant, without any extraordinary exertions, without the least personal risk, and, in truth, with very little trouble. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly intitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment. So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompense differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, whether every man who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating and uncertain amount of the recompense which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of the pointer dog [found at defendant's house twelve months after it was lost, who claimed 20*s.* for the dog's keep (*Binstead* v. *Buck* (1777), 2 Bla. Wm. 1117)], was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it, if it were established. The owners of this kind of property [timber], and the owners of craft upon the river, which lie in many cases moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them" (*Nicholson* v. *Chapman* (1793), 2 Bla. H. 254, at pp. 258, 259: *Eyre*, C.J.). (26)

Canadian Cases.

(26) A pound keeper, under an obligation to receive cattle brought to him to be impounded, whether properly brought or not, is entitled to payment of fees before release (*Black* v. *Stewart*, 19 N. S. L. R. 77. *Badkin* v. *Powell*, Cowp. 476, followed; see also *Dodge* v. *Baker*, 24 N. S. L. R. 552).

When bankers are merely gratuitous bailees they have no lien.

Defendants allowed William Leese (a stock and share broker), while he had an account with them, to keep at their banking house several boxes, in which he, from time to time, for more safe and convenient keeping, deposited various deeds and other documents, as well such as were entrusted to him by customers for purposes connected with his business as others which were his own property. The defendants did not keep the key of these boxes or any of them, nor were they informed what the same contained. The contents of the boxes were from time to time, without let or hindrance on the part of the defendants, and in fact without any reference to them, removed and dealt with by William Leese, who kept the keys and had constant access to the boxes as he pleased.

"The evidence that the boxes in question were only deposited for safe custody is clear; and that the bankers, there being no special duty undertaken by them or contract entered into with them in reference thereto, or their contents, were merely gratuitous bailees, seems to me to be also clear, according to the decision in *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317, there not being here, as in *In re United Service Co., Johnston's Claim* (1871), L. R. 6 Ch. 212, any arrangement for the bankers receiving dividends or income payable on any of the securities contained in the boxes. The bankers being merely gratuitous bailees, and William Leese being allowed to open the boxes from time to time, and to come and take them away, how can the defendants maintain their alleged lien? They had nothing to do with the contents of the boxes in the way of receiving either principal or income. They were wholly ignorant as to what the boxes contained. . . .

"The general rule as to a banker's lien is clear and forms part of the law merchant, of which the court takes judicial notice. The previous authorities were as observed by Vice-Chancellor *Wood* in *Jones* v. *Peppercorne* (1858), John 430, all examined in the case of *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787. That case was a much stronger one in favour of the bankers than the present, because there the exchequer bills were taken out of the box and were in the bankers' hands, and they received the interest on them and exchanged them. It was admitted in the argument in that case—and such admission was approved in the judgment—that the original bills in the box were not subject to a lien, and the case of the respondents was rested on the distinction that the exchequer bills had been taken out of the box and placed in the bankers' hands. That case is undistinguishable from the present

in any particular favourable to the defendants, and it governs this case" (*Leese* v. *Martin* (1873), L. R. 17 Eq. 224, at pp. 234—236: Sir *Charles Hall*, V.-C.). (27)

SECTION XI.

STATUTE OF LIMITATIONS.

The Statute of Limitations begins to run from the detention after demand by the depositor independently of any other act of conversion such as would make the depositary liable in an action for trover. The owner is entitled to sue, at election, either for a wrongful parting with the property (if he discovers and can prove it), or to wait until there is a breach of the depositary's duty in the ordinary course by refusal to deliver up upon request. The wrongful parting would be an abuse of the trust reposed in the depositary, and the depositor should not be prejudiced by the wrong-doing of the depositary.

An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him.

The foregoing doctrines are well explained in the following extracts:

1. "And, indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him" (*Taylor* v. *Plumer* (1815), 3 M. & S. 562, at p. 574: Lord *Ellenborough*, C.J.)

2. "It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute [of Limitations] begins to run, and that subsequent circumstances which would, but for the prior wrongful act or default, have constituted a cause of action, are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment. The rule

Canadian Cases.

(27) If a banker's lien exists in the province, the person against whom it is sought to enforce it must be a customer of the bank (*Allen* v. *Bank of New Brunswick*, S. C. N. B. R. 1).

that a cause of action arises once for all upon the first default is, however, not universal; for, in cases where a man undertakes to do an act upon a future day, and before the day arrives disables himself from performing the act, or positively and absolutely refuses to be bound by or perform his contract, and, so to speak, declares off the bargain himself, and absolves the opposite party, it is in the option of such party at his election to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter. This principle was well maintained in *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678. In delivering the judgment in that case, Lord *Campbell*, C.J. (at p. 691), thus stated the reason of the decision: 'It seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it (the contract) as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer.' The same doctrine was recognised and approved by the Court of Exchequer Chamber in *Avery* v. *Bowden* (1856), 6 El. & Bl. 953). Upon like reasoning, it seems to follow on the one hand that, where the action of detinue is founded upon a wrongful conversion of the property only, as it needs must where there is a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms, the statute would run from the time at which the property was first wrongfully dealt with. This, however, as we have already observed, is not like the present case, in which the plate was originally taken for safe custody, to be restored when required.

"On the other hand, if the action of detinue is resorted to, as it may be (Com. Dig., Detinue (A.)) for the purpose of asserting against a person intrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue, at election, either for a wrongful parting with the property (if he discovers and can prove it), or to wait until there is a breach of the bailee's duty in the ordinary course by refusal to deliver up on request; and that in the latter case it is no answer for the bailee to say that he has by

his own misconduct incapacitated himself from complying with the lawful demand of the bailor. Such is the effect of the decisions referred to in the course of the argument in *Williams* v. *Archer* (1847), 5 C. B. 318 and *Reeve* v. *Palmer* (1858), 5 C. B. (N.S.) 84; in which latter case a loss of the chattels by negligence, which, though of itself plainly gave no cause of action of trover or detinue (*Williams* v. *Gesse* (1837), 3 Bing. (N.C.) 849, yet did give cause of a special action for negligence, at the option of the owner, was held to be no answer to an action of detinue founded upon a subsequent demand and refusal, which were held to constitute a substantive cause of action, notwithstanding that the property had before the demand ceased to be in the possession of the bailee. In that case, the principle that a man intrusted with property for safe custody cannot better his position by wrongfully parting with possession of it, but must be answerable as if he retained the possession, was applied both in this court and in the Exchequer Chamber to the action of detinue. And this is agreeable to the maxim, '*Qui dolo desiit possidere pro possidente damnatur*'" (*Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206, at pp. 209—211: *Willes*, J., delivering the judgment of the court (*Willes*, *Montague Smith*, and *Brett*, JJ.)).

3. One George Tidd took money for the purpose of safe custody and nothing else. Not as a loan, but as a trust for safe custody, and the parties present seemed to think that George Tidd might use it in the meantime.

"I think the case falls within the principle put by *Pothier*. I do not find there has been any dissent from the view of *Pothier* in any reported case: although I do find that the same rule is not applied to the case of money paid into a bank on current account. The passage in *Pothier* is this: 'Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that, upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand' [Pothier on Contracts, by Evans, vol. ii., p. 126]. That seems to me the law of England" (*In re Tidd*, [1893], 3 Ch. 154, at p. 156: *North*, J.).

CHAPTER III.

MANDATES.

SECTION I.—*Derivation and Definitions of the word Mandate*, p. 103.

SECTION II.—*Contract of Mandate*—

(*a*) *Parties*, p. 105.
(*b*) *Subject-matter of Mandates*, p. 105.
(*c*) *Title of Mandator to the Subject-matter of Mandate*, p. 105.
(*d*) *Delivery*, p. 105.
(*e*) *Consideration*, p. 105.

SECTION III.—*Mandatary's Duty and Responsibility*—

(*a*) *Non-performance or Non-feasance*, p. 107.
(*b*) *Neglect or Misfeasance*, p. 108.
(*c*) *Degree of Care, Diligence, Skill, and Knowledge demanded of a Mandatary*, p. 109.

SECTION IV.—*Possessory Interest and Right of Action of Mandatary*, p. 114.

SECTION V.—*Mandatary's Account*, p. 115.

Mandates come under that class of bailments in which the *bailor* is solely benefited by the bailment, and form the second sub-division of the class of gratuitous bailments that I shall deal with. In this class of bailment there is *service* with incidental *custody*.

SECTION I.

DERIVATION AND DEFINITIONS OF THE WORD MANDATE.

The word mandate is derived from the Latin word *mandatum*, meaning a charge, order, injunction, commission.

Holt, C.J., says in *Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 918, that a mandate "is an obligation which arises *ex mandato*. It is what we call in English an acting by commission." Previously he had said (at p. 913) that this sort of bailment was: "When there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage."

Sir *William Jones* (at p. 52) says: "Employment by *commission* was also known to our ancient lawyers; and *Bracton*, the best writer of them all, expresses it by the Roman word, *mandatum*." Sir *William Jones* had previously (at p. 35) defined the word as follows:

"*Mandatum*, or *commission*, when the mandatory undertakes, without reward, to *do some act* about the things bailed, or simply to *carry* them."

Subsequently, at p. 117, he defines mandate in somewhat different language, as follows:

"Mandate is a bailment of goods without reward, to be carried from place to place, or to have some act performed about them."

Story, in s. 137, says that the contract of mandate may be more simply stated to be, at the common law, "A bailment of personal property, in regard to which the bailee engages to do some act without reward"; but, he adds, at the end of the same section, in the choice of definitions, that none strikes his mind as more neat and distinct than that of Mr. Chancellor *Kent*, who says:

"A mandate is when one undertakes, without recompense, to do some act for another in respect of the thing bailed" (2 Kent, Comm. Lect. 40).

The word "mandate" has other meanings in law besides the technical one above given to it, *e.g.*, a judicial command, a charge. *Jones* says, at p. 53, that a judicial command or precept is a *secondary* and inaccurate usage of the word mandate.

The bailor in this case is sometimes conveniently called the *mandator*, and the bailee the *mandatary*.

Three things are involved in the various definitions given above, viz.:

(i) A bailment or delivery of goods or chattels;

(ii) Some act is to be done about the goods or chattels;

(iii) There is to be no reward or recompense for the act which is to be done.

The difference between deposit and mandate is at times very slight. *Story* says (s. 140) that the true distinction between them is, "in the case of a *deposit*, the principal object of the parties is the *custody* of the thing, and the service and labour are merely accessorial; in the case of a *mandate*, the *labour and services* are the principal objects of the parties, and the [?custody of the] thing is merely accessorial."

SECTION II.

CONTRACT OF MANDATE.

(a) Parties.

The capacity to be parties to a mandate is regulated by the general law concerning capacity to contract (see *ante*, p. 10, Chapter I.—Introductory, Section II.—(h) Parties to a Contract of Bailment).

(b) Subject-matter of Mandates.

Goods and chattels, that is to say, personal or movable property, are the subject-matter (see *ante*, p. 53, Chapter II.—Deposits, Section II.—(c) Subject-matter of Deposits).

(c) Title of Mandator to the Subject-matter of Mandate.

As a general rule, a mandatary cannot dispute the title of his mandator to the goods or chattels (see also *ante*, p. 91, Chapter II. —Deposits, Section IX.—Title of Third Person to Deposits).

(d) Delivery.

As to this, see *ante*, p. 53, Chapter II.—Deposits, Section II.—(e) Delivery and Custody of Deposit ; and *post*, p. 143 Chapter V. —Pledges, Section II.—(d) Delivery.

(e) Consideration.

The mere acceptance of the goods by the mandatary and his promise to render the service are a sufficient consideration.

The mandator's trusting the mandatary with the goods or chattels is a sufficient consideration (see also *ante*, p. 55, Chapter II.—Deposits, Section II.—(f) Consideration). If there should be any reward or recompense, the contract would become one of *hire* of work, labour, and services (see *post*, Chapter VIII.—Hire of Work, Labour, and Services).

Acceptance.—The acceptance of money to deliver and promise to deliver are a good consideration to charge the recipient (see *Wheatley* v. *Low* (1624), Cro. Jac. 668 ; see also *Shillibeer* v. *Glyn* (1836), 2 M. & W. 143).

Trusting.—"It is objected that there is no consideration to ground this promise [to carry brandy from one cellar to another] upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that *the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 919 : *Holt*, C.J.).

Delivery.—"Is there then, any consideration for the defendant's promise? The count states, that the plaintiff had retained the defendant at his request to lay out 700*l.* in the purchase of an annuity. That the defendant promised to lay it out securely, and that the plaintiff delivered him the money for that purpose. The case of *Coggs* v. *Bernard* ((1704), Ld. Raym. 909), decides that this was abundant consideration ; the consideration in that case was the delivery of brandy ; here it is the delivery of 700*l.*, which casts it on the defendant to account for the same" (*Whitehead* v. *Greetham* (1825), 2 Bing. 464, at p. 468 : *Best*, C.J.).

General Rule.—"The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is 'either for the benefit of the defendant or to the trouble or prejudice of the plaintiff' (see Com. Dig., Action on the Case in Assumpsit, (B.) 1). If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced" (*Bolton* v. *Madden* (1873), L. R. 9 Q. B. 55, at pp. 56, 57 : *Blackburn*, J., delivering the judgment of the court (*Blackburn*, *Mellor*, and *Quain*, JJ.)).

"A consideration is sufficient if there be a benefit to the defendant or a detriment to the plaintiff" (*Edgware Highway Board* v. *Harrow Gas Co.* (1874), L. R. 10 Q. B. 92, at p. 95 : *Blackburn*, J.).

SECTION III.

MANDATARY'S DUTY AND RESPONSIBILITY.

"A distinction seems very early to have been made in our law between the *non*fesance and *mis*fesance of a *conductor operis*, and by equal reason, of a mandatary ; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it" (Jones, p. 54).

"He (Sir *William Jones*) admits, indeed, what cannot be denied, that, in the common law, there is a clear distinction between cases of nonfeasance and misfeasance. In cases of nonfeasance the mandatary is not generally liable, because, his undertaking being gratuitous, there is no consideration to support it, and it becomes a *nude pact*, and the rule is '*ex nudo pacto non oritur actio*' ; but in cases of actual misfeasance, the common law gives a remedy for the injury done, and to the extent of that injury" (Story, s. 165).

(a) Non-performance or Non-feasance.

(a) A party who merely undertakes to perform an act is under no obligation to perform the act which he has undertaken. If he merely undertakes to perform and do not proceed on the work no action will lie against him for the non-performance on account of the absence of consideration.

(b) If, however, the party receives the goods for the purpose of performing the work or service it is a sufficient consideration.

The statement (b) depends upon the law laid down (*ante*, p. 105, Section II.—Contract of Mandate, (e) Consideration).

The statement (a) appears to be good law from the following authorities :

"If a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 Hen. 6, 36 (1425)" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909 : *Gould*, J.).

"Now I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houses ; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking : nor is he bound to perform all the work that is tendered to him ; and therefore the amount of this is, that the defendant has merely told a falsehood, and has not performed his promise ; but for his non-performance of it no action can be supported. This is warranted by Lord *Holt's* opinion in *Coggs* v. *Bernard* (1704), Ld. Raym. 909, p. 919, where, recognizing the case in 11 Hen. 4, 33 (1410), he said : 'There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie.' And on this opinion I think I may safely rely" (*Elsee* v. *Gatward* (1793), 5 T. R. 143, at pp. 148, 149 : Lord *Kenyon*, C.J.).

"The distinction is this : if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeazance in the course of that work ; but if he undertake, and do not proceed on the work, no action will lie against him for the nonfeazance. In this case the defendant's undertaking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation to compel him to perform this work, and that distinguishes this case from those of a common carrier, porter, and ferryman, who are bound from their

situations in life to perform the work tendered to them ; but a carpenter, as such, is not bound by any such obligation" (*ibid.*, p. 150 : *Ashurst*, J. See *post*, Chapter VIII.—Hire of Work, Labour, and Services ; Section IV.—Employee's Rights, Duty, and Responsibility).

(b) Neglect or Misfeasance.

If the mandatary chooses to consider the contract as binding, and to act upon it, and a loss or an injury accrues to the mandator by the neglect or misfeasance of the mandatary, the latter is liable.

"If the bailee will take the goods into his custody, he shall be answerable for them ; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 911 : *Powell*, J.).

"As to the sixth sort of bailment [mandate], it is to be taken that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy ; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this ? In Bracton lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. . . . This undertaking obliges the undertaker to a diligent management. . . . The reasons are—first, because in such a case a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, pp. 918, 919 : *Holt*, C.J.).

(c) Degree of Care, Diligence, Skill, and Knowledge demanded of a Mandatary.

In the absence of a special contract the mandatary is bound to act prudently and honourably and to use such reasonable care, diligence, skill, and knowledge as he actually possesses, or as can be implied from his profession, employment, or situation, and he is only liable for gross negligence.

As to the meaning of gross negligence, see *ante*, p. 21, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect, and p. 56, Chapter II.—Deposits, Section III.—Depositary's Duty and Responsibility.

"The mandatary being considered as having engaged himself to use *a degree of diligence and attention adequate to the performance of his undertaking*, the omission of such diligence may be, according to the nature of the business, either *ordinary* or *slight* neglect, although a bailee of this species ought regularly to be answerable only for a violation of *good faith* . . . for since *good faith* itself obliges every man to *perform his actual engagements*, it, of course, obliges the mandatary to exert himself in proportion to the exigence of the affair in hand, and neither to *do* anything, how minute soever, by which his employer may sustain damage, nor *omit* anything, however inconsiderable, which the nature of the act required; nor will a want of ability to perform the contract be any defence for the contracting party; for though *the law exacts no impossible thing*, yet it may justly require that every man should know his own strength before he undertakes to do an act, and that, if he delude another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

"It is almost needless to add that a mandatary, as well as a depositary, may bind himself by a *special* agreement to be answerable even for casualties, but that neither the one nor the other can exempt himself by any stipulation from responsibility for *fraud*" (Jones, 53).

"The true rule of the common law would seem, therefore, to be, that a mandatary, who acts gratuitously in a case, where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust

which he undertakes, and he fairly exercises them, he will not be responsible for any errors of conduct or action, into which a man of ordinary prudence might have fallen. If his situation or employment does imply ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. If he is known to possess no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge and judgment and capacity. This general responsibility may be varied by a special contract of the parties, either enlarging, or narrowing it; and in such cases the particular contract will furnish the rule for the case" (Story, s. 182(*a*)).

"The degree of care which a mandatary may be required to exert, must be materially affected by the nature and value of the goods, and their liability to loss and injury. That care and diligence which would be sufficient as to goods of small value, or of slight temptation, might be wholly unfit for goods of great value, and very liable to loss and injury. In the former case, the same acts might be deemed slight neglect only, which, in respect to the latter, might justly be deemed gross neglect" (Story, s. 186).

The following abstracts of, and extracts from, English cases illustrate and establish the law as laid down by Story:

1. The defendant Blackburne, who was a general merchant, in London, having received orders from his correspondent in Madeira to send thither a quantity of leather *cut out for shoes and boots*, employed Goodwin, a bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather, on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels, and he, in order to save the expense and trouble of a separate entry at the custom-house, *voluntarily and without any compensation*, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of *wrought leather*, instead of *dressed leather*, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of Goodwin to recover the value of the leather, which he had prepared to export on his own account. "The defendant in this case was not guilty either of gross negligence or fraud; he acted *bonâ fide*. If a man applies to a surgeon to

attend him in a disorder, *for a reward*, and the surgeon treats him improperly, there is *gross negligence*, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook *gratis* to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted *to the best of his knowledge*, to an action" (*Shiells* v. *Blackburne* (1789), 1 Bla. H. 159, at p. 162: *Heath*, J.).

2. "Where *money has been paid* for the performance of certain acts, the person receiving it is by law, answerable for *any degree* of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is *gratuitous*, and the party has acted *bonâ fide*, it is not consistent either with the spirit or policy of the law to make him liable to an action. Here Goodwin (the bankrupt, who was a shoemaker) wanted to dispose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the custom-house cannot be considered as *gross negligence*, when, from the variety of laws relating to the customs, reliance must be placed on the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late Act (28 Geo. 3, c. 38) applied to a clerk in the custom-house to make a proper entry of it, who, not understanding the Act of Parliament, entered it wrong, and the goods were seized: when, therefore such cases happen, it is too much to infer *gross negligence* from the mistake which the defendant committed" (*ibid*, at p. 162: *Wilson*, J.).

3. "I agree with Sir *William Jones*, that where a bailee undertakes to perform a *gratuitous act*, from which the bailor alone is to receive benefit, *there the bailee is only liable for gross negligence*; but if a man gratuitously undertakes to do a thing *to the best of his skill*, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as *gross negligence*. If in this case a ship broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be *gross negligence*, because their situation and employment necessarily imply a competent degree of knowledge in making such entries;

but when an application under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as *gross negligence*" (*ibid*, at p. 163: Lord *Loughborough*, C.J.).

4. "Every man who undertakes a commission, incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of a commission? The fair performance of the duties that belong to it. . . . The commissioner employed is *pro hac vice* the servant of those who employ him. What is the obligation of a servant? If I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss if his pocket was picked in the way; but if instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *negligentia maliciosa*, in doing that, from which the law must infer that he intended the event which has actually taken place" (*The Rendsberg* (1805), 6 Rob. A. 142, at pp. 154—156: Sir *William Scott*).

5. The plaintiff retained, without reward, the defendant, in no particular character, to invest 1,400*l*. in the purchase of an annuity for the plaintiff. "Can we say that it is the absolute duty of any person so employed, without pay, and without remuneration—can we, under those circumstances, say that it is his absolute duty not to take a security of an insufficient nature? . . . The only duty that is imposed under such a retainer and employment as is here mentioned is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. But a man may, when acting most faithfully and most honestly, happen to take an insufficient security, without gross or culpable negligence on his part, he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take with regard to the subject matter intrusted to him, and yet doing all that, his endeavours may have failed, and it may so happen the security may, without his knowledge and against his will, have turned out to be insufficient" (*Dartnall* v. *Howard* (1825), 4 B. & C. 345, at pp. 350, 351: *Abbott*, C.J.).

6. "Nothing was to be paid for its (a certain parcel's) conveyance; but still, if the coachman received it, it was his duty to take care of it, and deliver it at the office in Holborn, to which it was addressed. The parcel was of value and known to him to

be so; and it being his duty to deliver it, the jury are to say whether there was great negligence on the part of the defendant; if there was not great, and somewhat extraordinary, negligence on his part, the verdict ought to be for him" (*Beauchamp* v. *Powley* (1831), 1 Moo. & Rob. 38, at p. 40: Lord *Tenterden*, C.J.).

7. Plaintiff had intrusted a horse to the defendant, requesting him to ride it to Peckham, for the purpose of showing it for sale to a Mr. Margetson. The defendant accordingly rode the horse to Peckham, and for the purpose of showing it, took it into the East Surrey Race Ground, where Mr. Margetson was engaged with others playing the game of cricket: and there, in consequence of the slippery nature of the ground, the horse slipped and fell several times, and in falling broke one of his knees. It was proved that the defendant was a person conversant with and skilled in horses. "We must take the summing up altogether; and all that it amounts to is, that the defendant was bound to use such skill in the management of the horse as he really possessed. Whether he did so or not was, as it appears to me, the proper question for the jury" (*Wilson* v. *Brett* (1843), 11 M. & W. 113; at pp. 114, 115: Lord *Abinger*, C.B.).

8. "The defendant was shown to be a person conversant with horses, and was therefore, bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it" (*ibid.*, at p. 115: *Parke*, B.).

The reader is also referred to *ante*, p. 12, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect, and to p. 56, Chapter II.—Deposits, Section III.—Depositary's Duty and Responsibility.

SECTION IV.

POSSESSORY INTEREST AND RIGHT OF ACTION OF MANDATARY.

See also *ante*, p. 73, Chapter II.—Deposits, Section V.—Possessory Interest and Right of Action of Depositary. The general principles there laid down apply to mandataries as well as to depositaries. It is true that the custody of a mandatary is incidental to the service he is to render, yet the goods *are* deposited gratuitously to enable the gratuitous work to be done.

Story says (s. 152) that "where a mandatary delivers goods to another person, and they receive an injury, for which the mandatary would be liable over to the owner, there does not seem to be any objection, upon principle, to his right to recover for his own indemnity. . . . The general principle of the common law is, that possession alone is a sufficient title to enable the possessor to maintain a suit against a mere wrongdoer for any wrong or injury done to the thing."

A word or two must be said on the following statement:

"The plaintiff must show that he had an absolute or a special property in the parcel lost. That he was not the owner is admitted; and the question is, whether at the time of the loss he had it on any bailment. The evidence is, that the parcel was delivered to him, not, for the purpose of carrying it to London himself, but of booking it at the defendants' office in Stockton. In violation of that trust, the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag; thereby depriving Garbut [the owner] of any remedy he might have had against the defendants in case the parcel had been lost by them, and becoming himself a wrong-doer towards the defendants, by depriving them of the sum they would otherwise have earned for the carriage of the parcel. Does the loss of this parcel, then, give the plaintiff any ground to say he has sustained damage at the hands of the defendants? I think it does not" (*Miles* v. *Cattle* (1830), 6 Bing. 743, at p. 747: *Tindal*, C.J.).

See observations on this case by Story (s. 152) who says, "It is clear that the plaintiff in this case, by his own misconduct, had rendered himself liable to the owner for the full value of the parcel; and, indeed, in a legal sense, he had converted it to his own use. Why, under such circumstances, he should not be entitled to an action against mere wrongdoers, or his own bailees, for their tort or negligence in regard to the parcel, is somewhat difficult to perceive."

The plaintiff in the case of *Miles* v. *Cattle* ((1830), 6 Bing. 743) was clearly a mandatary, and as such was liable to his bailor for his negligence. Such liability was sufficient to enable him to maintain the action against the defendant Cattle. He had an interest in the integrity and safety of the parcel and could sue for a damage done to that interest (see *Rooth* v. *Wilson* (1817), 1 Barn. & Ald. 59 ; *Giles* v. *Grover* (1832), 6 Bli. (N.S.) 277, *ante*, p. 76).

SECTION V.

MANDATARY'S ACCOUNT.

"The mandatary is bound to render to the mandator, upon request, a full account of his proceedings ; to show that the trust has been duly performed ; or, if ill performed, to offer a justification or legal excuse for such ill performance. If the property is to be restored to the bailor after the work is done, then such restitution is included in the mandatary's duties. If by his fraud, or gross negligence, or misuser, the mandatary has made himself liable in damages, he must pay these damages" (Story, s. 191).

With regard to other matters, such as the mandatary's right to use the subject of the mandate ; re-delivery of the subject of the mandate, and determination of the contract ; action for return of the subject of the mandate or its value and damages for its detention ; title of third persons to the subject of the mandate ; mandatary's lien, and Statute of Limitations, the reader is referred to Sections VI.—XI. respectively of Chapter II.—Deposits, *ante*, pp. 78—102, which equally apply to Mandates.

CHAPTER IV.

LOANS FOR USE.

SECTION I.—*Definitions*, p. 116.

SECTION II.—*Contract of Loan for Use*—
(*a*) *Parties*, p. 117.
(*b*) *Subject-matter of Loans for Use*, p. 117.
(*c*) *Consideration*, p. 117.

SECTION III.—*Lender's Duty and Responsibility*, p. 117.

SECTION IV.—*Borrower's Duty and Responsibility*—
(*a*) *User By Borrower*, p. 119.
(*b*) *Degree of Care, Diligence, Skill and Knowledge demanded of Borrower*, p. 122.

SECTION V.—*Re-delivery of the Subject-matter of the Loan for Use*, p. 126.

SECTION VI.—*Possessory Interest and Right of Action of Borrower or Lender*, p. 127.

SECTION VII.—*Borrower's Lien*, p. 130.

Loans for use come under that class of bailments in which either the bailor or bailee is solely benefited by the bailment, being a bailment in which the *bailee* is solely benefited. Loans for use are the third subdivision of gratuitous bailments that I shall deal with.

SECTION I.

DEFINITIONS.

"When goods or chattels, that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be restored *in specie*" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 913: *Holt*, C.J.).

"*Commodatum*, or *loan for use*, when goods are bailed, without pay, to be *used* for a certain time by the bailee" (Jones, p. 36).

"*Lending for use* is a *bailment* of *a thing* for a certain time *to be used* by the borrower *without paying for it*" (*ibid.* p. 118).

"Mr. Chancellor *Kent*, with his usual neatness, defines it to be a bailment or loan of an article for a certain time, to be used by the borrower without paying for the use" (Story, s. 220).

The bailor in this case is usually called called the *lender*, and the bailee the *borrower*.

From the definitions above furnished, it appears that:

(i.) The subject-matter of the loan is *goods or chattels*.
(ii.) The goods or chattels must be *lent*.
(iii.) The loan must be *gratuitous*.
(iv.) The loan must be *for the use of the borrower*.
(v.) The use is to be for a *certain time*.
(vi.) The goods or chattels are to be *restored in specie*.

SECTION II.

CONTRACT OF LOAN FOR USE.

(a) **Parties.**—The capacity to be parties to a loan for use is regulated by the general law concerning capacity to contract (see *ante*, p. 10, Chapter I.—Introductory, Section II.—(h) Parties to a Contract of Bailment).

(b) **Subject-matter of Loans for use.**—Goods or chattels are to be the subject-matter, as to which see *ante*, p. 53, Chapter II.—Deposits, Section II.—(c) Subject-matter of Deposits.

(c) **Consideration.**—The contract should be voluntary and without reward; for should there be any reward or recompense the contract would become one of hire of goods or chattels (see *post*, Part III., Chapter VII.—Hire of Goods and Chattels).

SECTION III.

LENDER'S DUTY AND RESPONSIBILITY.

The lender is responsible for defects in the goods or chattels with reference to the use for which he knows the loan is accepted, of which he is aware, and which, if concealed, may make the loan perilous, or unprofitable to the borrower, and owing to which directly the borrower suffers loss or injury. The authorities, whether text writers or decisions, on this matter are very few, as will appear from the following extracts.

"It is surprising how little in the way of decision in our courts is to be found in our books upon the obligations which the *mere* lender of a chattel for use contracts toward the borrower. Pothier, in his Traité du Prêt à Usage to be found in the fourth volume of his works by Dupin, pt. 3, pp. 37—42, enters into the subject at

some length : and Story also treats of it ; Bailments, s. 275. The principles, which these two writers draw mainly from the Roman law, may be the more safely relied on as engrafted into the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs* v. *Bernard* ((1704), 2 Ld. Raym. 909), demonstrates. It may however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower ; the borrower therefore is not responsible for reasonable wear and tear ; but he is for negligence, for misuse, for gross want of skill in the use ; above all, for any thing which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest ; and Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumave est, condemnandus eo nomine est.* This is so consonant to reason and justice, that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs* v. *Bernard* ((1704), 2 Ld. Raym. 909) and followed out by Lord *Kenyon* and *Buller*, J., and by Lord *Tenterden*, in the *Nisi Prius* cases cited in the note, 1 L. Cas. 162 (4th edit.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him" (*Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 El. & Bl. 1035, at pp. 1050—1052 : (*Coleridge*, J., delivering the judgment of the court (*Coleridge* and *Wightman*, JJ.)).

"In *Blakemore* v. *The Bristol and Exeter Rail. Co.* (1858), 8 El. & Bl. 1035, which was an action for injury by an insufficient crane lent by the defendant, the court laid down the rule of the lender's responsibility thus : 'It may, etc.' (see *supra*)," (*MacCarthy* v. *Young* (1861), 6 H. & N. 329. at p. 336 : *Wilde*, B.).

See also *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145, approving of the above cases.

Extraordinary Expenses incurred by Borrower.

The question whether the lender is liable to re-imburse the borrower any extraordinary expenses he has been put to for the preservation of the thing lent seems not to have arisen in our courts. "Probably" as Story says (s. 274) "in such a case (for it cannot be asserted to be clear), in the absence of all counter-vening presumptions, if the repairs had conferred a permanent benefit upon the thing loaned, beyond the mere use for the journey, an obligation to re-imburse the borrower to that extent might be implied. There might be more difficulty in regard to the cure of the sick horse, the expenses of which cure might reasonably be presumed to be a charge on the borrower within the scope of the contract, as necessary to his further use upon the journey." As to expenses incidental to user, see next section, at p. 121.

SECTION IV.

BORROWER'S DUTY AND RESPONSIBILITY.

(a) User by borrower.

The borrower must not make use of the goods and chattels contrary to the trust expressed or implied.

The use is a personal one, annexed to the borrower, unless a different use is expressed or implied from surrounding circumstances. (1)

In the absence of all controlling circumstances, the use intended is, in general, the natural and ordinary use to which the goods and chattels are adapted.

If no particular time for the use is fixed, a reasonable time is intended.

The borrower is not responsible for reasonable wear and tear, but he is for negligence, misuse, and fraud. (2)

Canadian Cases.

(1) A bailment of this kind is strictly personal and confined to the borrower. Where goods are lent to an insolvent and detained by the assignee:—*Held*, that they could be replevied without demand. *Per Thompson*, J.: "The plaintiff was under no obligation to demand his goods before bringing replevin for them. He could have sustained replevin for them even against the insolvent without previous demand; but the assignee had no right to them whatever. The loan was to the insolvent only, and the insolvent had not the right or power to transfer them to anyone else or to empower anyone else to use them" (*Dennison* v. *Gavaya*, 6 Russell & Geldert (N.S.) 490).

(2) The court refused to set aside a verdict given for the plaintiff in an action by the bailor against the bailee of a horse for negligence, although the

The above general principles may be collected from the authorities following, where they are also well illustrated.

1. "In respect to the use, what is, or is not, within the scope of the bailment, must depend upon a great variety of implications and presumptions, growing out of the circumstances of each particular case; and no general rule can be laid down which will govern all cases. In general, it may be said, in the absence of all controlling circumstances, that the use intended by the parties is the natural and ordinary use to which the thing is adapted. In regard to time, if no particular time is fixed, a reasonable time must be intended, keeping in view the objects of the bailment" (Story, s. 255).

2. "If a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. . . . But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable where there is such a force as he cannot resist" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at pp. 915, 916: *Holt*, C.J.).

3. Trespass for immoderately riding the plaintiff's mare. The defendant pleaded, that the plaintiff lent to him the said mare and that by virtue of this license the defendant and his servant *alternative* had rid upon the mare. The plaintiff demurred.

The Court.—The license is annexed to the person, and cannot be communicated to another: for this riding is matter of pleasure. *North*, C.J., took a difference, where a certain time is limited for the loan of the horse, and where not. In the first case, the party to whom the horse is lent, hath an interest in the horse during that time, and in that case his servant may ride, but in the other case not. A difference was taken betwixt *hiring* a horse to go to

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Canadian Cases.

jury were not able to agree whether the bailment was a *commodatum* or *mutuum*, the injury being such as to make the defendant liable in either case (*Rainsbury* v. *Ross*, N. B. R., 2 Kerr, 179).

York, and *borrowing* a horse: in the first place, the party may set his servant up; in the second, not. Note (*a*). The objection was, that the defendant pleaded license for the taking, but gave no answer to the immoderate riding; and the court adjudged the plea good; the *taking* being the *git* [? gist], and the *riding* only aggravation of the trespass (*Bringloe* v. *Morrice* (1687), 1 Mod. 210).

4. A mare was placed in the hands of one Shackel for the purpose of being sold, and the defendant, who appeared to like the mare, asked permission to have a trial of her, which was granted, and the defendant having received possession of the mare, not only tried her himself, but put another person's servant on the mare, and whilst the servant was riding her, the mare was injured, and afterwards died of the injuries she received. "The defendant had this mare for the purpose of trying her, and I think that he was entitled to put a competent person on the mare to try her. I shall leave it to the jury to say, whether the groom of General Dyson was a competent person, and whether he rode the mare only for the purpose of trying her. . . . The only question of fact is, whether the defendant did any more than was necessary for the purpose of trying the mare" (*Camoys* v. *Scurr* (1840), 9 C. & P. 383, at p. 386: *Coleridge*, J.) [*Note.*—On a subsequent day, the court was applied to to set aside the nonsuit, on the ground that the defendant had no right to allow the groom to ride the mare for him; but the court refused the rule.]

Wear and Tear.

"If I lend a piece of plate, and covenant *by deed* that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me" (*Pomfret* v. *Ricroft* (1680), 1 Saund. 321, at p. 323 (*b*): *Hale*, C.J.).

"The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud" (*Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 El. & Bl. 1035, at pp. 1050, 1051: *Coleridge*, J., delivering the judgment of the court (*Coleridge* and *Wightman*, JJ.).

Expenses incidental to User.

"If, in using the thing, the borrower is put to any expense, this must be borne by himself. Thus, for example, if a horse is lent to a friend for a journey, he must bear the expenses of his food during that journey, and of getting him shod, if he should chance to

require it; for it is a burden which is naturally attendant upon the use of the horse" (Story, s. 256).

"The borrower (as we have already seen [s. 256]) is compellable to bear the ordinary expenses; for the loan being for his benefit, he must be presumed to engage to bear the burden as an incident to the use" (*ibid.* s. 273).

Providing Horse with Food.

"If a person lends a horse to be used by another, the law will imply an obligation on the borrower to provide him with food during the time of his use, unless there be an agreement to the contrary" (*Handford* v. *Palmer* (1820), 5 Moore, Ex. 74, at p. 79: *Richardson*, J.).

(b) Degree of Care, Diligence, Skill, and Knowledge demanded of Borrower.

In the absence of any special contract, and subject to certain exceptions, it may be laid down generally that:

The borrower is bound to use the greatest care and diligence, and is liable for the least neglect.

Where the borrower's profession or situation is such as to imply the possession of competent skill he is liable for the neglect to use it.

As to "*commodatum* or lending *gratis*, the borrower is bound to the *strictest care and diligence*, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 915: *Holt*, C. J.).

"The negligence of the borrower, who alone receives benefit from the contract, is construed rigorously, and, although *slight*, makes him liable to indemnify the lender" (Jones, p. 65).

"A *borrower for use* is responsible for slight negligence" (*ibid.*, p. 120).

"What shall be deemed slight neglect, or want of extraordinary diligence, must depend upon the particular circumstances of each case" (Story, s. 239).

"Though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard* ((1704), 2 Ld. Raym. 909). Though in some cases a greater degree of care is exacted than in others, yet in 'the second sort of bailment, viz., *commodatum* or lending *gratis*, the borrower is bound to the *strictest care and diligence* to keep the goods so as to restore them back again to the lender;

because the bailee has a benefit by the use of them, so as if the bailee be guilty of the *least neglect* he will be answerable" (*Vaughan* v. *Menlove* (1837), 3 Bing. (N.C.) 468, at p. 475: *Tindal*, C.J.).

Skill Implied.

The plaintiff had intrusted the horse in question to the defendant, requesting him to ride it to Peckham for the purpose of showing it for sale.

"The defendant was shown to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned judge (*Rolfe*, B.) as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it" (*Wilson* v. *Brett* (1843), 11 M. & W. 113, at p. 115: *Parke*, B.).

"The borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud" (*Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8 El. & Bl. 1035, at p. 1051: *Coleridge*, J., delivering the judgment of the court (*Coleridge* and *Wightman*, JJ.)).

Care of Accessories belonging to Goods Lent.

"It seems hardly necessary to add, that the same care which the bailee is bound to take of the *principal* thing bailed must be extended to such *accessory* things as belong to it and were delivered with it; thus, a man who borrows a watch is responsible for *slight* neglect of the chain and seals" (Jones, p. 66, and Story, s. 238 (*a*)).

Exceptions to General Rules.

"If goods be lent for the *sole* advantage of the *lender* the borrower is answerable for *gross* neglect only" (Jones, p. 72; Story, s. 238).

"The borrower is also exempted, generally, from all liability for losses by inevitable accident, or by casualties which could not be foreseen and guarded against. . . . Under the head of

casualties may be enumerated not only such losses as have been mentioned, namely, fire, the fall of edifices or ruins, shipwreck, and lightning, but also all such losses as human prudence cannot by extraordinary diligence guard against, such as losses by pirates, by enemies, by mobs, by sudden inundations, by sudden sickness, and even by the frauds of strangers, against which the borrower could not guard himself" (Story, s. 240. See also *ante*, p. 27, Chapter I.—Introduction, Section IV.—Inevitable Accident).

"Had the borrower [of a horse], indeed, been imprudent enough to leave the high road and pass through some thicket, where robbers might be supposed to lurk, or had he travelled in the dark at a very unseasonable hour, and had the horse, in either case, been taken from him or killed, he must have indemnified the owner; for *irresistible force* is no excuse, if a man put himself in the way of it by his own rashness. This is nearly the case cited by St. German from the Summa Rosella, where a *loan* must be meaned, though the word *depositum* be erroneously used; and it is there decided, that, if the borrower of a horse will imprudently ride by a *ruinous house in manifest danger of falling*, and part of it actually fall on the horse's head, and kill him, the lender is entitled to the price of him; but that, if the house were *in good condition* and *fell* by the violence of a sudden hurricane, the bailee shall be discharged. For the same, or a stronger reason, if William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any *accident* that may befal the horse in his journey to Bath, or after the expiration of the week. Thus, if Charles, in a case before, *post* (Jones, p. 50), wear the masked habit and jewels of George at the ball for which they were borrowed, and be *robbed* of them in his return home at the usual time and by the usual way, he cannot be compelled to pay George the value of them; but it would be otherwise if he were to go with the jewels from the theatre to a gaming-house, and were there to lose them by any casualty whatever. So, in the instance proposed by Gaius in the Digest, if silver utensils be lent to a man for the purpose of entertaining a party of friends at supper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender if the plate be lost by accident however irresistible" (Jones, pp. 68, 69, and Story, ss. 241—243).

Impossibility.

"Nor will his (the borrower's) incapacity to exert *more than ordinary* attention avail him on the ground of an *impossibility*, 'which the law,' says the rule, 'never demands,' for that maxim

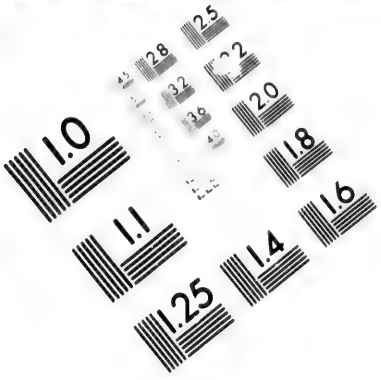
relates merely to things *absolutely* impossible ; and it was not only very possible, but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it ; if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he must be supposed to have demanded no higher care than that of which *such* a person was capable ; as, if Paul lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he would from a riding-master, or an officer of dragoons" (Jones, p. 65, and Story, s. 237).

Concealment.

"Since openness and honesty are the soul of contracts, and since 'a suppression of truth is often as culpable as an express falsehood,' I accede to the opinion of Mr. Pothier, that if a soldier were to borrow a horse of his friend for a battle expected to be fought the next morning, and were *to conceal from him that his own horse was as fit for the service*, and if the horse so borrowed were slain in the engagement the lender ought to be indemnified ; for, probably the dissimulation of the borrower induced him to lend the horse ; but, had the soldier openly and frankly acknowledged *that he was unwilling to expose his own horse*, since, in case of a loss, he was unable to purchase another, and his friend, nevertheless, had generously lent him one, the lender would have run, as in other instances, the risk of the day" (Jones, p. 70). See also Story (s. 243) who says, "A more simple case of tacit fraud would be, where the soldier has borrowed the horse for the next day, concealing the fact of any expected battle, or of any intended use for that purpose, for the lender may be fairly presumed, in such case, to lend for a journey, or for common use, and not for war."

Loan for Common Benefit of Lender and Borrower.

"Besides the *general* exception to the rule concerning the degrees of neglect, namely, *si quid convenit vel plus vel minus*, another is, where goods are lent for a use in which the lender has *a common interest* with the borrower : in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence ; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expense, for which purpose Philip lends a service of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take *ordinary* care of the plate ; but this, in truth, is rather the innominate contract, *do ut facias*, than a proper loan" (Jones, 72, and Story, s. 238).



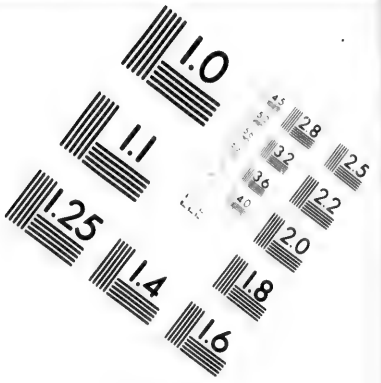
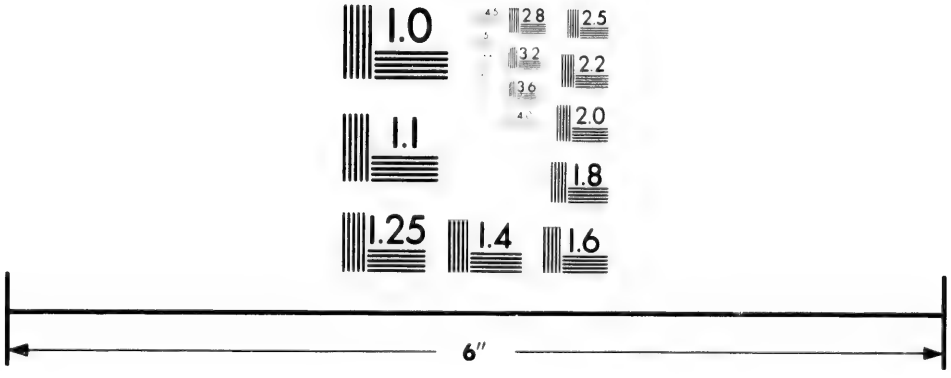
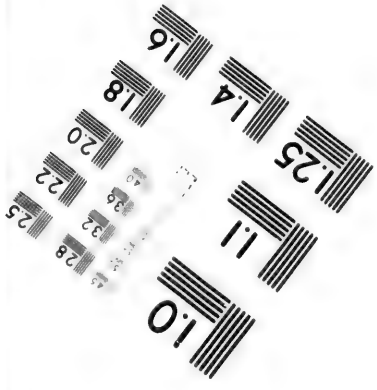
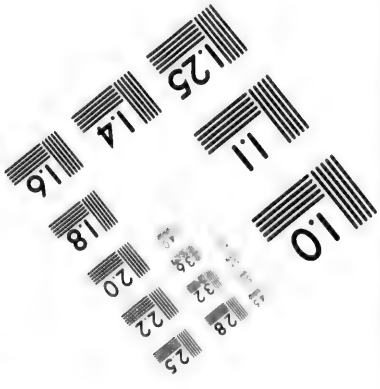


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SECTION V.

RE-DELIVERY OF THE SUBJECT-MATTER OF THE LOAN FOR USE.

It appeared from Section I. (Definitions), *ante*, p. 116, that the goods or chattels had to be restored *in specie*.

Bailee or Bailor in morâ.

"If the bailee, to use the Roman expression, be *in morâ*, that is, if *a legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee have legally tendered the thing, and the bailor have put himself *in morâ* by refusing to accept it: this rule extends, of course, to every species of bailment" (Jones, pp. 70, 71).

"So, if the borrower is *in morâ*, as it is technically called, that is, if he is in default, as if he has omitted or refused to return the thing loaned, when it ought to have been returned, or after a due demand, he will be responsible for any subsequent loss thereof, although it may be occasioned by accident or the *vis major*" (Story, ss. 254, 259).

See *post*, Chapter XI.—Carriers, Section XVII.—Damages, (*b*) *causa causans* and *causa proxima*, and especially the case of *Davis* v. *Garnett* (1830), 6 Bing. 716, there cited.

Increments.

In making the restitution of the property borrowed the borrower is not only bound to restore the thing specially, but also the increments, earnings, and gains derived from it. See also, *ante*, p. 80.

Accessorials.

"The thing borrowed is not only to be returned, but everything that is accessorial to it. Thus, the young of an animal born during the time of the loan is to be restored" (Story, s. 260). (3)

Canadian Cases.

(3) *Commodatum.*—In the case of a gratuitous loan, all the increase and offspring of the loan, and everything accessorial to it (in this case a pair of mares, offsprings of a mare loaned, and portion of harness acquired as payment for the use of oxen) belong to the lender, and must be returned at the

Place of Re-delivery.

With regard to the place where the thing is to be returned, Story says (s. 261) "The common law seems not to have laid down any special rules on this subject; but it has left the decision to be made upon the particular circumstances of each case, as it shall arise, according to the presumed intention of the parties."

Perhaps the rule in the Sale of Goods Act, 1893 (56 & 57 Vict c. 71), s. 29 (1), might with advantage be adapted somewhat as follows: Apart from any contract, express or implied, the place of re-delivery is the lender's place of business if he has one, and if not, his residence according to the nature of the thing to be re-delivered.

As the loan is solely for the benefit of the borrower the rule *ante*, pp. 82, 83, Chapter II.—Deposits, Section VII., respecting the place of re-delivery of deposits is not applicable.

SECTION VI.

POSSESSORY INTEREST AND RIGHT OF ACTION OF BORROWER OR LENDER.

See *ante*, p. 38, Chapter I.—Introductory, Section VII.—Property in Goods and Chattels; and *ante*, p. 73, Chapter II.—Deposits, Section V.—Possessory Interest, etc. What is said there would seem to apply with still greater force to the possession of a borrower who has the right *to use* the things lent and has to restore them *in specie*.

Bacon, in his Abridgement, says the borrower has a qualified property. I subjoin the few authorities there are on this question.

If a man lend another his sheep, oxen, or his cart, the borrower hath a *qualified property* in them, according to the purposes for which they were borrowed; and by force of this loan they may be used reasonably for these purposes and for the time agreed on; and if they perish in such occupation it is at the peril of the lender; but if they perish in any other manner the borrower must answer for them (Bac. Abr., tit. Bailment (C.)).

If a man delivers goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends there to do himself right (Bac. Abr. tit. Bailment (D)).

Canadian Cases.

determination of the loan, and are not subject to seizure under executions against the bailee (*Dillarie* v. *Doyle*, 43 U. C. Q. B. 442). "A bailment of this kind is strictly personal and confined to the borrower" (*per Armour*, J.).

"If during the time of use, a stranger molests or disturbs the borrower in the use, there the remedy of the borrower is solely against the stranger and not against the lender, unless the stranger derives a title from the lender, or does the act by his connivance; or unless the loan is made in bad faith by the lender, knowing that the title is in the stranger, who will reclaim it" (Story, s. 272).

Borrower's Liability from Possession.

1. The defendant borrowed a horse and gig of Messrs. Delafosse and Co., and a Mr. Nicholls accompanied the defendant in it on an excursion into the country. As they were returning home, Mr. Nicholls driving, and the defendant sitting with him in the gig, the accident happened which was the subject of the action.

"The defendant having borrowed them (the horse and chaise) for his own enjoyment, and not to use them for the service of the owner, is very properly charged as in the possession and control of them. Then the question is, whether, being so in possession of them, and sitting with the driver of them, he may not be charged as actually driving? I think he may. As against all the world but Delafosse and Co. he is the party in possession: he is present, he has the actual control, and he permits another person to drive. I think an action might have lain against him, alleging that Nicholls, by his consent, had driven improperly, and thereby occasioned the injury" (*Wheatley* v. *Patrick* (1837), 2 M. & W. 650, at p. 652: Lord *Abinger*, C.B.).

2. The owners of a horse sent it to the plaintiff, an auctioneer, to sell by auction, and gave him leave to use it until it was sold. Whilst the horse was being driven in the plaintiff's carriage along a street, it was frightened by a steam tramcar of the defendants which was travelling at an excessive speed. The horse, in consequence, plunged and fell, and damaged both the carriage and itself. The accident was wholly due to the negligence of the defendants. The plaintiff brought an action in the county court to recover the amount of the depreciation of the horse as well as the damage to the carriage. The judge directed the jury that, as the plaintiff had not been guilty of any negligence, and was consequently under no liability to the owners of the horse, he was not entitled to recover for the injury to the horse, and judgment was accordingly entered for the damage to the carriage only. The plaintiff appealed.

"Now, it seems perfectly clear that the plaintiff was under no liability to his bailor for the damage to the horse, for he was not an insurer and he had not been guilty of any negligence. But it has been contended that, notwithstanding that he was under no such liability, he was nevertheless entitled to recover the amount of the depreciation because he was in possession of the horse at the time

of the accident, though it is admitted that having recovered such damages he would hold them as trustee for the bailor. I cannot accede to that view. It is true that if a man is in possession of a chattel, and his possession is interfered with, he may maintain an action, but only for the injury sustained by himself. The right to bring an action against the wrongdoer is one thing ; the measure of the damages recoverable in such action is another. And here the plaintiff has suffered no loss at all. It was contended that though either the bailee or the bailor might sue, only one action could be brought, and that if the bailee recovered first the bailor's right of action was barred, and the remedy of the bailor in such a case was against his bailee as for money had and received to his use. I do not agree with that contention. If both the bailee and the bailor have suffered damage by the wrongful act of a third party, I think that each may bring a separate action for the loss sustained by himself. I cannot understand why a bailee should be allowed to recover damages beyond the extent of his own loss simply because he happened to be in possession" (*Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, at pp. 423, 424 : *Hawkins*, J.).

"It has been contended that because the plaintiff was bailee of a horse to which an injury was done, while in his possession, by a third person, he is entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff as towards his bailor. The mere statement of that proposition is enough to show that it cannot be true. There are many cases, no doubt, where a bailee in possession of a chattel has recovered against a stranger wrongfully taking it out of his possession or destroying it the full value. This might well be the case if the bailee was liable over to the bailor, or if no one but the bailee was in a position to sue.

"The cases that have been cited [*Jeffries* v. *Great Western Rail. Co.* (1856), 5 El. & Bl. 802 ; *Rooth* v. *Wilson* (1817), 1 Barn. & Ald. 59 ; *Croft* v. *Alison* (1821), 4 Barn. & Ald. 590, and *Nicholls* v. *Bastard* (1835), 2 C. M. & R. 659], relate only to the right of a bailee to maintain an action ; they have nothing to do with the measure of damages recoverable in such action. A physical interference with possession is a wrong for which undoubtedly a bailee may sue ; but it is quite another thing to say that he may recover in such action the same damages as if he were the owner. It has been argued that the bailee may recover as trustee for the bailor ; but for this proposition there is no authority : it is wholly repugnant to good sense ; and there is certainly no case in which a bailee has recovered damages under such circumstances and been

made to account for an unascertained portion of them to his bailor" (*ibid.*, at pp. 424, 425: *Wills*, J.).

3. "The case of *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, which bears on this point, may possibly require at some future time further consideration" (*Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, at p. 394: A. L. *Smith*, L.J.).

Action of Trespass by Lender.

1. Trespass for running against the plaintiff's chaise. Plaintiff, a stable keeper, was owner of a chaise. When the injury was done it was in the possession of one Brown, a friend of his, whom he had permitted to use it. Lord *Ellenborough* said, the property is proved to be in the plaintiff, and *primâ facie* the thing is to be considered in his legal possession, whoever may be the actual occupier. Show a letting for a certain time to Brown, and the possession would be in him; but a mere gratuitous permission to a third person to use a chattel does not, in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used (*Lotan* v. *Cross* (1810), 2 Camp. 464).

2. "This is not like a gratuitous permission to use a chattel, as in *Lotan* v. *Cross* ((1810), 2 Camp. 464) where the possession constructively remained in the owner" (*Hall* v. *Pickard* (1812), 3 Camp. 187, at p. 188: Lord *Ellenborough*).

3. "It is fully established, that, in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed" (*Mears* v. *London and South Western Rail. Co.* (1862), 11 C. B. (N.S.) 850, at p. 854: *Williams*, J.).

SECTION VII.

BORROWER'S LIEN.

"The borrower cannot retain the thing borrowed for any antecedent debt due to him. . . . The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favour" (Story, s. 264).

And see *ante*, p. 97, Chapter II.—Deposits, Section X.—Depositary's Lien.

With regard to other matters, such as the action for return of the subject-matter of the loan for use, or its value, and damages for its detention, the title of third persons to the subject of the loan, and Statute of Limitations, the reader is referred to Sections VIII., IX. and XI. of Chapter II.—Deposits, *ante*, pp. 83—97, 100—102.

PART III.—BAILMENTS FOR REWARD.

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SECTION XIV.—*Pawnbrokers and the Pawnbrokers Act*, 1872, p. 195.

Bailments for reward include what are called Pledges and Hirings, and are those in which both the bailor and bailee are benefited. They form by far the more important class of bailments from a practical standpoint. They are also the more extensive of the two branches of bailments. Bailments for reward are in this work sub-divided into two groups, viz. : *Pledges* and *Hire*, and they will be dealt with in the order they are named.

SECTION I.

DEFINITIONS.

"When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English a pawn or a pledge" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 913: *Holt*, C.J.).

"*Pignori acceptum*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt" (Jones, p. 36).

"*Pledging* is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be discharged*" (*ibid.*, p. 118).

"In the common law, it [the term pledge or pawn] may be defined to be a bailment of personal property, as a security for some debt or engagement" (Story, s. 286).

The words pledge and pawn appear to be synonymous; yet pledge is more often used in a general sense and pawn in a particular sense.

The party pledging is called the pledgor, pledger, or pawnor, and the party to whom the pledge is made is called the pledgee, pawnee, or pawnbroker. Pawnbroker, however, is now usually confined to the person who carries on the trade of pawnbroking.

From these definitions it appears that:

(i.) The subject-matter of a pledge is *goods or chattels*;
(ii.) The goods or chattels must be *delivered*;
(iii.) The delivery must be to a creditor of the pledgor *to secure his debt*.
(iv.) The goods or chattels are to be kept by the creditor *till the debt be discharged*.

(a) Lien, Pledge, and Mortgage distinguished. (1)

Lien arises from the mode of dealing between the parties, the

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(1) As collateral security for the payment of certain acceptances, the defendants deposited with the plaintiffs certain of the defendants' mortgage bonds, with power of sale in case of default. After default and recovery of judgment upon the acceptances, plaintiffs filed their bill on behalf of all holders of similar bonds for a receiver and for sale of the railway:—*Held* (*Bain*, J.), "That the legal title in the bonds did not pass to the plaintiffs, but that they were pledges merely. Their remedy was a sale of the bonds and not a sale of the railway." Upon appeal:—*Held*, that having regard to the surrounding circumstances, the plaintiffs were not pledgees of the bonds, and that no obligation arose upon them until after sale of them by the plaintiffs under their power (*West Cumberland Iron Co.* v. *Winnipeg*, 6 Man. Rep. 388).

There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security inter-

usage of trade, or it is given by express contract. It is the *right* of a creditor *to retain* the goods until his debt is paid or satisfied. It is either particular or general. Instances of lien occur throughout this book. (See Index.)

Pledge is a *delivery* of goods to a creditor as security for his debt and the *right to the property* vests in the creditor so far as is necessary to secure the debt. The pledgee has merely a *special property* in the goods pledged until the debt is paid off.

Mortgage is more than a pledge, it is a *conveyance* of goods to the mortgagee *conditionally* that if the goods are not redeemed at the time stipulated the title of the mortgagee becomes *absolute* in law.

The above distinction may be gathered from a perusal of the following authorities:

1. "A mortgage of goods is, in the common law, distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption. But in a pledge, a special property only, as we shall presently see, passes to the pledgee, the general property remaining in the pledgor. There is also another distinction. In the case of a pledge of personal property the right of the pledgee is not consummated, except by possession; and, ordinarily, when that possession is relinquished, the right of the pledgee is extinguished or waived. But in the case of a mortgage of personal property, the right of property passes by the conveyance to the pledgee, and possession is not, or may not be, essential to create or to support the title" (Story, s. 287).

2. "Delivery is of the essence of an English pawn, 5 H. 7. 1. Bro. Title Pledges, pl. 20. Title Trespass, pl. 271 and 2 R. Rep. 429, and no authority contradicts these resolutions."

"The distinction between mortgages and pawns is laid down in Noy, 137, and in Cro. Jac. 245 (1). *There is a difference between*

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mediate betweeen a lien and a mortgage, viz., a pledge. The authorities show that the difference between a pledge or pawn of personal chattels and a mortgage of them is, that a mortgage passes the whole legal interest and property from the mortgagor to the mortgagee, and possession by the mortgagee is not essential to create his title, and, generally speaking, is inconsistent with such a title, while a pledge transfers only a special property in the thing pledged, the general property continuing with the pledgor. The pledgee's right is not complete until he has obtained possession, and his right or special property is to hold the pledge as security for the debt or engagement of the pledgor, and on default to sell the pledge. (*Per Bain*, J., in *West Cumberland* v. *Winnipeg*, 6 Man. Rep. 388.)

mortgaging of lands and pledging of goods; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods to detain them for his security: *per Fleming*, Ch.J., *et al.* (*Sir John Ratcliff* v. *Davies* (1611). Yelv. 178.) The delivery is nothing but the bare custody, and it is not like to a mortgage; for then he that has the interest ought to have the money, but in the case of a pledge, it is only a special property in him that takes it, and the general property continues in the first owner, upon tender of the money secured by the pawn, by the pawner, the property, notwithstanding the refusal, is reduced constantly to the pawner without claim: S. C., 2 Bulst. 30" (*Ryall* v. *Rolle* (1749), 1 Atk. 165, at p. 167: *Burnet*, J.).

3. "*A mortgage* is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time: *a pledge* is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation or the course of trade to be a lien upon them" (*Jones* v. *Smith* (1794), 2 Ves. 372, at p. 378: Sir *Richard Pepper Arden*, M.R.).

4. "Lien [general] is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.* If a consignee takes an express security, it excludes lien" (*In re Leith's Estate* (1866), L. R. 1 P. C. 296, at p. 305: Lord *Westbury* delivering the judgment of the Judicial Committee).

5. "We cannot arrive at the conclusion that he [the plaintiff] is so entitled without getting rid of the case of *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585; and, so far from feeling disposed to overrule that case, we are satisfied of its good sense, and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge—where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any

difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff" (*Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299, at pp. 302, 303: *Willes*, J., delivering the judgment of the Court of Exchequer Chamber (*Willes*, *Blackburn*, *Keating*, *Montague Smith*, and *Lush*, JJ.)).

See also *post*, p. 189, and Chapter X.—Innkeepers; *Angus* v. *McLachlan* (1883), 23 Ch. D. 330, at pp. 334, 335: *Kay*, J.

6. "The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid" (*Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, at p. 489: *Bramwell*, L.J. See also *Legg* v. *Evans* (1840), 6 M. & W. 36, at pp. 41, 42: *Parke*, B., *post*, p. 173.).

7. "A mortgage conveys the whole legal interest in the chattels; a pawn conveys only a special property, leaving the general property in the pawnor: a pawn is subject in law to a right of redemption, and no higher or different right of redemption exists in equity than in law; a mortgage is subject not only to the legal condition for redemption, but to the super-added equity. A pawn involves transfer of the possession from the pawnor to the pawnee. A mortgage may be made without any transfer of possession. In my opinion, the two transactions of pawn and mortgage are in their nature distinct, and I think that, except by new agreement between the parties, what was originally a pawn never becomes a mortgage, and what was originally a mortgage never becomes a pawn" (*Ex parte Official Receiver*, *In re Morritt* (1886), 18 Q. B. D. 222, at pp. 234, 235: *Fry*, L.J.).

A mere pledge is not within the Bills of Sale Acts, 1878, 1882 (41 & 42 Vict. c. 31 and 45 & 46 Vict. c. 43).

"When a transaction is one of pledge, and nothing more, the document which describes it is not a 'bill of sale' in the ordinary sense of the words, or within s. 4 of the Act of 1878, and therefore it is not within the Act of 1882" (*Ex parte Hubbard* (1886), 17 Q. B. D. 690, at p. 697: Lord *Esher*, M.R.).

"The transaction appears to me to be a pawn or pledge, accompanied by a document regulating the rights of the pledgee with regard to the goods of which the possession is delivered to him. I consider it clear that a document of this kind, which is not intended to transfer the property in goods, or to give any right to the possession of them, is not within either of the Bills of Sale Acts, and is not struck at by either of them" (*ibid.*, at pp. 698, 699: *Bowen*, L.J.).

See also *Charlesworth* v. *Mills*, [1892] A. C. 231, approving of the above case.

(b) Pledges classified.

Pledges may be classified as follows:

(i.) The common law pledge;
(ii.) The pledge by a factor; and
(iii.) The pawn with a pawnbroker.

They will be dealt with in the above order.

SECTION II.

CONTRACT OF PLEDGE.

(a) Parties.

The capacity to be parties to a pledge is regulated by the general law concerning capacity to contract. In the case of factors also, by the Factors Act, 1889 (52 & 53 Vict. c. 45), and in the case of pawnbrokers also, by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(b) Subject-matter of Pledge.

By the definitions, the subject-matter of a pledge is goods or chattels. (See *ante*, p. 132.)

"The property pledged may be anything of a personal nature, whether corporeal or otherwise, so that it be in existence and capable of actual or symbolic delivery, and that the pawnor, or some person by whose consent he pawns, have a present possession and title" (Fisher on Mortgages, 3rd ed., s. 81; 5th ed., para. 193, p. 99).

"And first, as to the things which may be the subject of it [the contract of pledge]. These are, ordinarily, goods and chattels; but money, debts, negotiable instruments, choses in action, and, indeed, any other valuable things of a personal nature, such as

patent rights and manuscripts, may, by the common law, be delivered in pledge" (Story, s. 290). (2)

In *Lockwood* v *Ewer* (1742), 9 Mod. 275, East India stock was pledged.

In *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, debentures were pledged.

In *Langton* v. *Waite* (1868), L. R. 6 Eq. 165, Grand Trunk of Canada railway stock was pledged.

In *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299, scrip certificates were pledged; and

In *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309, half a 50*l.* bank note was pledged.

Documents of Title.

By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 3, a pledge of the "documents of title" [as defined by the Act] to goods shall be deemed to be a pledge of the goods. It has been decided, however, that this provision is not to be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents. (See *Inglis* v. *Robertson*, [1898] A. C. 616.)

What may not be Pledged.

At common law, upon the principle of public policy, an assignment of the half-pay of a military officer is invalid, and can confer no right whatever on the assignee. (See *Flarty* v. *Odlum* (1790), 3 T. R. 681; *Lidderdale* v. *The Duke of Montrose* (1791), 4 T. R. 248; and *Stone* v. *Lidderdale* (1795), 2 Anst. 533.)

By 47 Geo. 3, Sess. 2, c. 25 (1807), s. 4, "All assignments, bargains, sales, orders, contracts, agreements, or *securities* whatsoever, which shall be given or made by any person entitled to any such pay, pension, allowance, or relief as aforesaid [viz., ordered by the secretary at war and paymasters general to officers or persons who have served in her Majesty's forces, or any widows of any such officers or persons, etc. (see s. 1)] for, upon, or in respect

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(2) Section 30 (2) of R.S.O. 1877, c. 150, gives express power to the directors, under the sanction of a byelaw approved of by the vote of not less than two-thirds in value of the shareholders, to hypothecate and pledge the real and personal property of the company to secure any sum borrowed for the purposes thereof. When the depositing of goods in a warehouse, and the raising of money on the security thereof, seems, upon the evidence, to be an important constituent for the successful prosecution of the company's business, then it would be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing in this case (*Merchants' Bank* v. *Hancock*, 6 O. R. 285).

As to right of executors to pledge personal securities, see *McLean* v. *Hime*, 27 U. C. C. P. 195.

of any such his pay, pension, allowance, or relief, shall be absolutely null and void to all intents and purposes" [repealed by s. 193 of the Army Act, 1881 (44 & 45 Vict. c. 58)] (see *Knight* v. *Bulkeley* (1858), 27 L. J. Ch. 592; *Lloyd* v. *Cheetham* (1861), 3 Giff. 171).

By the Army Act, 1881 (44 & 45 Vict. c. 58), s. 141, every assignment of, and every *charge* on, and every agreement to assign or *charge* any deferred pay, or military reward payable to any officer or soldier of any of her Majesty's forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a Royal Warrant for the benefit of the family of the person entitled thereto, or as may be authorised by any Act for the time being in force, be void.

(c) Title of Pledgor to Goods and Chattels pledged.

At common law:

(i.) Mere possession of goods and chattels is not sufficient proof of property against the true owner.

(ii.) No pledgor can give a better title to the goods and chattels than he has himself, and the real owner will not be bound, except to the extent of the interest which he has parted with or an authority, express or implied, which he has given. (3)

(iii.) Liens are personal, and cannot, as a rule, be transferred.

The above common law rules appear from the authorities next given. To what extent the *common law* has been altered by statutes, the reader is referred to *post*, Section XIII.—Factors and the Factors Acts, and Section XIV.—Pawnbrokers and the Pawnbrokers Act, 1872.

Mere possession of goods and chattels is not at common law sufficient proof of ownership against the true owner.

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(3) Where there is no sale at all, but a mere obtaining of goods by false pretences, the property does not pass out of the plaintiffs. If, therefore, an innocent pledgee obtains the pledge from a person with whom there was no contract, he must submit to his loss unless he can show that the pledgor was in possession of the goods in some other capacity, enabling him to make a valid pledge (*Bush* v. *Fry*, O. R. 15, 122; Factors Act, R. S. O. 1897, c. 150).

A bailee or pawnee of goods may maintain replevin against the pawnor for a wrongful taking of the goods pledged. Proof of such pawning is sufficient to enable the pawnee to recover in an issue joined upon the ordinary plea of property against the general owner (*Gibson* v. *Boyd*, (New Brunswick,) 1 Kerr, 150).

1. Trover for plate by the plaintiffs, who claimed under a remainderman against the defendant, to whom it was pawned by the tenant for life. Admiral Stewart, by will, gave his plate to trustees for use of his wife *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it for a valuable consideration with the defendant, who had no notice of the settlement; and before the commencement of this action she died. A demand and refusal were proved. The question was, whether the defendant was bound to deliver up the plate without being paid the money he had advanced on it?

Per curiam.—This point is clearly established, and the law must remain as it is till the legislature think fit to provide, that the possession of such chattels shall be a proof of ownership (*Hoare* v. *Parker* (1788), 2 T. R. 376).

2. "Had I authority to alter the law, as the mode of carrying on commerce has altered, I would say that, when the owner of property conceals himself, whoever can prove a good title under the person whom the concealed owner permits to hold it, should retain that property against the owner: but this is not yet the law of England. Possession is not proof of property. Our ancestors kept their goods in their own possession. If agents were employed by them to deal with their property, they did not keep themselves out of view, and the extent of the authority of the agent was so well known, that no one dealing with these agents could be imposed upon. But as little credit was given, and as men could not trade beyond their capital, they were seldom reduced to the necessity of pledging their stock-in-trade. The sales of merchandise were made in market overt, and if the buyers conducted themselves honestly, the law protected them from suffering by purchasing in market overt property that did not belong to the person of whom they bought. This exception in our law proves that if a person acquires the possession of property in any mode, other than that of sale in market overt, he cannot keep it against the owner; it proves at the same time, that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property as if it were his own. But a small proportion of the merchandise that is now brought to sale, is sold in market overt. The law relative to sales in market overt, affords, therefore, but little protection to those who are engaged in commerce.

"The owners of goods for many reasons keep themselves concealed, and put forward brokers to act for unknown principals.

If such brokers abuse their trust, those who have trusted them should suffer: but it is for the legislature, and not the courts of justice, to adapt the law to this new state of things. As the law now stands, if the pawner of goods has no authority to make the pledge, the pawnee cannot hold them against the owner" (*Williams* v. *Barton* (1825), 3 Bing. 139, at pp. 145, 146: *Best*, C.J.).

3. "Mere possession, with no further *indicia* of title than a delivery order, is not sufficient to entitle a *bonâ fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover" (*Kingsford* v. *Merry* (1856), 1 H. & N. 503, at p. 516: *Coleridge*, J., delivering the judgment of the court).

Title of person clothed with apparent authority to pledge.

4. "At *common law*, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.

"And the possession of bills of lading or other documents of title to goods did not at *common law* confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained had no greater effect at common law than the transfer of the actual possession.

"Lord Tenterden thus states the law (Abbot on Shipping, 5th edit., pt. 3, ch. ix., s. 19, p. 391): 'If the goods were sent to the consignee as a factor, it was thought that his possession of

the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do: and as, in the case of actual possession, although a factor might sell the goods, and thereby bind his principal, because his employment and authority are to sell, but could not pawn or pledge them because he is not by his employment authorised so to do, so, before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by indorsing or delivering over the bill of lading *as a pledge*.'

"The proposition that a factor is not by his employment authorised to pawn or pledge goods entrusted to him was for many years much controverted in point of fact. But, it having once been decided as a matter of law that he was not so authorised, the courts adhered to what had been decided.

"The law in this respect has been altered by 5 & 6 Vict. c. 39, as will be shown hereafter: but the legislature did not alter it in the first Factors Act (4 Geo. 4, c. 83) except in the case of consignments by sea. In *M'Combie* v. *Davies* (1805), 7 East, 5, the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts" (*Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at pp. 362, 363, 364: *Blackburn* J.).

Title for valuable consideration.

"Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling

the original owner of the goods, or of the chattel, to reduce the contract and set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced" (*Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, at pp. 463, 464 : Lord *Cairns*, L.C.).

Title to sell does not give title to pledge (see Factors Acts, *post*, Section XIII.).

"It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money. Not only in the nature of the case are there these differences, but there is no system of jurisprudence which does not recognise them. . . . Therefore, to say that where there is power given by law to sell, where a purchaser has by law a good title under circumstances particularly defined, that power extends by implication to a pledge, and that the pledgee will have a good title also, is an assumption for which neither reason nor authority has been, nor I think can be, alleged" (*City Bank* v. *Barrow* (1880), 5 App. Cas. 664, at pp. 670, 671: Lord *Selborne*, L.C.).

Title under contract induced by fraud.

"I think a confusion has arisen as to the kind of inferences to be drawn from the case of *Kingsford* v. *Merry* (1856), 1 H. & N. 503—a confusion of two totally different things. If a contract is induced by fraud, that contract may be affirmed or disaffirmed, and, until it is disaffirmed, any person dealing on the faith of that contract is protected, because until it is disaffirmed it is a perfectly good contract. I think it was made out before us that here there was no contract at all, and if the case had turned upon that question alone, I should say that no property had passed. But that is not the only question. There may be a question where, although no property had in fact passed, yet the true owner has

allowed another person to hold himself out as the owner in such a way as to make an innocent person enter into a contract, which contract being performed cannot be set aside. The case of *Kingsford* v. *Merry* (1856), 1 H. & N. 503, as to which, as I say, a considerable amount of misapprehension has existed before now, was a case in which, in truth, there was neither a holding out nor was there, in fact, a contract" (*Henderson and Co.* v. *Williams*, [1895] 1 Q. B. 521, at p. 525: Lord *Halsbury*).

(d) Delivery.

As we have seen from the definitions of "Pledge," *ante*, p. 132, there must be *delivery* of the goods to the pledgee and a keeping of them by him. The delivery need not be simultaneous with the lending of the money. The delivery may be a *de facto* or an actual delivery, *e.g.*, a manual delivery if the goods are not bulky. The delivery may also be symbolical or constructive, *e.g.*, by delivery of the key of the warehouse where the goods are stored, or something may be done which is equivalent to delivery, *e.g.*, a keeping of the goods without any actual delivery, as when the pledgee already has the goods. Again, the general principles of the law of agency apply, and the pledgor and pledgee may each act through the medium of another party, such agent being constituted by express appointment or by implication of law arising from the circumstances in which the parties stand, the maxims *Qui per alium facit per seipsum facere videtur* and *Omnis ratihabitio retrò trahitur, et mandato æquiparatur* both applying.

See also *ante*, p. 53, Chapter II.—Deposits, Section II.—(c) Delivery and Custody of Deposit, and the following authorities:—

"In the old books they took the nature of a pledge to be, that it ought to be delivered at the same time that the money was lent; and if the goods were not delivered at the same time, in security of the money, they did not plead it as a pledge, but in the nature of a license, to excuse the trespass. But by later authorities it appears that the pawnbroker [*quære*, pledgee] hath a special property, though it be not delivered at the time of the money lent" (Bac. Abr. Bailment (B).).

See *post*, pp. 146, 147, *Hilton* v. *Tucker* (1888), 39 Ch. D. 669, at p. 677.

Actual or constructive delivery.

"The transaction was this: Martin (the plaintiff) being in possession of a horse, a van, a cart, and two sets of harness, and being indebted to Bowers, delivered to him the van, horse, and one set of harness, and authorised him by a written memorandum to take the cart and the other set of harness [left in the plaintiff's

possession] to hold until he, Martin, repaid him the debt. The effect of this arrangement was, that the goods were handed to Bowers as a pledge. Bowers stood in the position of a pawnee. Now, I take the law to be, that to constitute a valid pledge, there must be a delivery of the article either actual or constructive to the pawnee; and, inasmuch as the memorandum purported to assign the property to Bowers, and as the horse and cart [*quære*, cart and one set of *harness*] remained in the stable of Martin, the question is whether there has been a valid pledge here. The evidence on this point was, that Bowers having no stable, requested Martin to allow the cart and harness to remain in his. In the written agreement the articles are stated to be in the possession of Bowers. Possession is an equivocal term: it may mean either actual manual possession or the mere right of possession. The question is, whether, as between these parties, the words used constitute the premises of Martin the premises of Bowers for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has over and over again been decided that the words of an agreement are to have effect according to the mind and intention of the parties. Thus, a delivery of goods in satisfaction of a debt has been held to amount to payment (*Cannan* v. *Wood* (1837), 2 M. & W. 465). So where goods have been purchased and left in the possession of the vendor for a special purpose of the vendee, that has been held to amount to a delivery (*Elmore* v. *Stone* (1809), 1 Taunt. 458). So, where a horse was sold but left in the stable of the seller, being only removed to another stall, that was held to amount as between the buyer and the seller to a delivery. And in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties" (*Martin* v. *Reid* (1862), 11 C. B. (N.S.) 730, at pp. 734, 735: *Erle*, C.J.). (4)

"Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself: *Howes* v. *Ball* (1827), 7 B. & C. 481" (*Donald* v. *Suckling* (July 7th, 1866), L. R. 1 Q. B. 585, at p. 613: *Blackburn*, J.). (5)

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(4) The delivery of warehouse receipts for flour, and the delivery of orders therefor, is not a constructive delivery of possession of the flour (*Dendy* v. *Goodenough*, 5 U. C. C. P. 163).

(5) "Possession is a question of fact, not of law. Certain legal results, such as acquisition of title under the statute of limitations, and the right to defend possession and re-acquire it after loss or forcible taking away, are legal consequences of possession; but in itself it is a pure question of fact, consisting,

Actual delivery not necessary.

"Now, with respect to a pledge according to the law of this country, a mere contract to pledge even specific goods, and even although the money is actually advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods. . . . But in order to complete the pledge, it is not necessary that there should be an actual delivery of the chattel to the pledgee: it is sufficient, as was decided in *Reeves* v. *Capper* (1838), 5 Bing. (N.C.) 136, and the other cases to which reference was made in the course of the argument, if there be a constructive delivery. It is not necessary that the subject of the pledge should have actually passed from the hands of the pledgor to those of the pledgee. The property in the goods may pass, even though they remain in the possession of the pledgor, provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee. (6) Such was the case of *Reeves* v. *Capper* (1838), 5 Bing. (N.C.) 136, where the master of a vessel pledged his chronometer with his owner, under a contract by which he was to be allowed to retain possession of it for the purpose of the voyage he was about to undertake; and, the master having subsequently disposed of the chronometer to another person, the pledgee was held entitled to recover it from the purchaser. So in many cases a symbolical delivery is held to be sufficient, a symbolical delivery being equivalent to such a constructive delivery as will complete a pledge. If it were necessary that I should lay down, as in a code all the series of circumstances which might be held to constitute a symbolical delivery, I should have desired more time to consider the matter. I should have liked to consider, amongst other cases, whether the delivery of the key of the warehouse in which goods are stored was or was not a sufficient symbolical delivery of the goods, and whether the claim of the person to whom it was given could be defeated by the fabrication of another key in order to deceive a second lender" (*Meyerstein* v. *Barber* (November 24th, 1866), L. R. 2 C. P. 38, at pp. 51, 52: *Willes*, J.).

"Ordinarily by the common law, although of course, a mortgage

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as it does, of the power of physical disposition of the thing which is the subject of it, coupled with the intention to possess as owner" (*per Strong*, J.: *Kinloch* v. *Scribner*, 14 S. C. R. 80). See *ante*, p. 53.

(6) There may be a pledge of goods, although they remain in the hands of the pledgor so long as there is a constructive delivery, and the goods remain with the pledgor by virtue of a contract with him to that effect, which makes the custody of the pledgor that of the pledgee (*In re Coleman*, 34 U. C. Q. B. 576).

may be given of chattels as well as of land without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods" (*Ayers* v. *The South Australian Banking Co.* (1871), L. R. 3 P. C. 548, at p. 554: *Mellish*, L.J., delivering the judgment of the Judicial Committee).

Delivery of key—Delivery need not be contemporaneous with the pledge.

"There are several cases cited on the interesting question of the effect of delivery of a key. I think, when they are examined, they all really come to this, that the delivery of the key in order to make constructive possession must be under such circumstances that it really does pass the full control of the place to which admission is to be gained by means of the key; as, for instance, where timber is deposited in a warehouse. The delivery of the key is the symbol of possession where the possession itself is practically impossible. A man being unable to carry about with him, or, at any rate, to conveniently move to his own warehouse adjoining, a large quantity of timber, the delivery of a key giving exclusive control is regarded as delivery of possession itself. I think that principle runs through all the cases on delivery of the key as equivalent to delivery of possession. That being so, I must decide this question of law which has been raised—whether it is essential to a pledge, not that there should be a delivery, because that is admitted to be essential, but that delivery should be actually contemporaneous with the advance of the money. When I say actually contemporaneous, I am not proposing to discuss a case where delivery has followed within an hour or a day afterwards, so that in support of the honesty of the transaction one might assume them to be practically contemporaneous, though not identical in point of time. But what is the effect where an advance is made as here, in November, and the delivery is not given until a month later, but then comes in pursuance and in fulfilment of the contract. I have pointed out that until delivery is made there is nothing but a contract, and the contract does not pass the property without such incidents as I have already mentioned. But I am not aware of any authority which goes so far as to say that the delivery must be contemporaneous so long as it is in honest fulfilment of the contract; and that case of *Reeves* v. *Capper* (1838), 5 Bing. (N.C.) 136, certainly is an authority the other way. Mr. Barber says that *Reeves* v. *Capper* would not be decided in the same way now as it was decided by a full Court of Common Pleas fifty years ago, or nearly so. But until that case is overruled it is binding upon me, and I, of course, must follow it, but I think it

right to add, irrespective of that decision, I am at a loss to understand why delivery should be actually contemporaneous with the advance. It seems to me that the transaction may be divided into two parts, and that though fraud may intervene in any case, however careful lawyers or actors may be, still, remembering that, in the meantime, there is no property in the lender until he has got the goods, it seems to me a very small opening for fraud to hold that the delivery need not be actually contemporaneous with the pledge. My view of the law certainly is, that if money is advanced, as here, on a contract that goods shall be delivered and that then those goods are delivered in pursuance of that contract, the same legal results follow as if the money was handed over with one hand and the goods received with the other" (*Hilton* v. *Tucker* (1888), 39 Ch. D. 669, at pp. 676, 677 : *Kekewich*, J.).

(e) Consideration.

The reader is referred to *ante*, p. 55, Chapter II.—Deposits, Section II.—(f) Consideration, and p. 105, Chapter III.—Mandates, Section II. (e) Consideration.

SECTION III.

PLEDGEE'S DUTY AND RESPONSIBILITY AT COMMON LAW.

The pledgee is bound to use only ordinary care and diligence. As to the meaning of ordinary care, see *ante*, p. 12, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect.

Ordinary Care.

"It is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's Case* is. But, indeed, the reason given in *Southcote's Case* is, because the pawnee has a special property in pawn. But that is not the reason of the case ; and there is another reason given for it in the Book of Assize, which is, indeed, the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 917 : *Holt*, C.J.).

"A *pawnee* is answerable for *ordinary* neglect" (Jones, p. 119).

"In every case where the pledge has suffered any injury by the default of the pledgee, the owner is entitled to a recompense in

proportion to the damages sustained by him. But, in estimating the damages, no compensation is to be made for any injury which has arisen by accident, or from the natural decay of the pledge" (Story, s. 351).

"If the pawnee lose the goods without any default in him, it shall be the loss of the owner, and the pawnee shall have an action against him for the money (Sal. 522)" (Com. Dig. Mortgage (A.)).

Theft.

"The true principles supported by the authorities seems to be that theft, *per se*, establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case. This is the just doctrine to which the learned mind of Mr. Chancellor *Kent* has arrived, after a large survey of the authorities; and it seems at once rational and convenient" (Story, s. 338).

Account of Profits.

"Another duty of the pawnee at the common law is, to render a due account of all the income, profits and advantages derived by him from the pledge, in all cases where such an account is within the scope of the bailment. . . . If the pawn consists of cows, horses, or other cattle, the profits of their labour are also to be accounted for, if within the contemplation of the parties. . . . So, if it is contemplated between the parties, that the pledge shall be employed in its usual business upon profit; as a ferry-boat at a ferry, or a coach and horses at a customary carriage of passengers" (Story, s. 343).

Increments.

"Another duty of the pawnee is, to return the pledge and its increments, if any, after the debt or other duty has been discharged. (7) Of course this debt or duty is by the common law

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(7) It is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security available. When a person is a creditor with a pledge or surety, he is in equity bound to account not only for the money he has actually made out of the pledge, but also for the money he might, ought, or should have made out of the pledge, and he must allow for that, whether he made them or not; and if by laches he has diminished the value of the pledge, he

extinguished, when the pledge is lost by casualty or other unavoidable accident, or it perishes through its own intrinsic defects, without any default of the pawnee. The same rule applies, when the pawn is lost by robbery, or by superior force, or even by theft, if the pawnee has exercised reasonable diligence" (Story, s. 339).

As to inevitable accident, see *ante*, p. 27, Chapter I.—Introductory; Section IV.—Inevitable Accident.

SECTION IV.

POSSESSORY INTEREST OF PLEDGEE AT COMMON LAW

See *ante*, p. 38, Chapter I.—Introductory; Section VII.—Property in Goods and Chattels.

The pledgee has a special property in the property pledged. This is abundantly shown by the following cases, the first dating nearly 300 years ago.

"In case of a pledge it is but a special property in him who takes it, and the general property continues in the first owner" (*per Fleming*, C.J., in *Sir John Ratcliff* v. *Davis* (1611), Yelv. 178).

The pawnee "has (in the pawn or pledge) a *special property*, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 916: *Holt*, C.J.).

"If goods are pledged for the security of money, the pawnee has special property in them (Salk. 522; R. Ow. 124)" (Com Dig., Mortgage (A.)).

"So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so too is that of the pledgee, which depends upon its non-performance" (2 Bl. Com. p. 396).

1. "It is not necessary, in this case to dispute the soundness of the decision in *Collins* v. *Martin* (1797), 1 B. & P. 648, for without doubt, if one deposit with his banker negotiable bills, and that

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is bound to allow for the sum he ought to have made. The negligent loss of security, therefore, discharges the surety (*Molsons' Bank* v. *Girdleston*, 44 U. C. R. 54); see also *Canadian Bank of Commerce* v. *Greene*, 45 U. C. R. 81).

banker afterwards deposit them with a third person as a pledge for his own debt the property in such bills will pass to the pledgee" (*Treuttel* v. *Barandon* (1817), 8 Taun. 100, at p. 103 : *Dallas*, J.).

2. "I think that both in principle and on authority, a contract such as that stated in the plea, pledging goods as a security, and giving the pledgee power in case of default to dispose of the pledge (when accompanied by an actual delivery of the thing), does give the pledgee something beyond a mere lien ; it creates in him a *special property or interest* in the thing. By the civil law such a contract did so, though there was no actual delivery of possession ; but the right of hypothec is not recognised by the common law. Till possession is given the intended pledgee has only a right of action on the contract, and no interest in the thing itself : *Howes* v. *Ball* (1827), 7 B. & C. 481" (*Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, at p. 613 : *Blackburn*, J.).

3. "There are two well-known and entirely distinct kinds of transaction. There is a mortgage of chattels, when there is no delivery of the chattels to the mortgagee, but the general property in them passes to him by the mortgage deed. There is another entirely distinct transaction, which was known to the Romans, and has been long familiar to English law, the transaction of a pawn or pledge, where there must be a delivery of the goods pledged to the pledgee, but only a special property in them passes to him, in order that they may be dealt with by him, if necessary, to enforce his rights—the general property in the goods remaining in the pledgor. A special property in the goods passes to the pledgee in order that he may be able—if his right to sell arises—to sell them. In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money either at the time originally appointed, or after notice by the pledgee" (*Ex parte Hubbard* (1886), 17 Q. B. D. 690, at p. 698 : *Bowen*, L.J.).

4. "Four partners pledged the warrants [of wine] in question as a security to the defendant : all four joined in the transaction, which amounted to a pledge only. The effect of the transaction was, that the four partners had the general property, and the defendant, the pawnee, had a special property in the goods. The defendant became entitled to the possession of the goods, and had also a power of sale in case the money should not be duly repaid. Until the money was repaid a special property remained in the defendant and the general property in the four partners" (*Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422, at pp. 426, 427 : *Blackburn*, J.).

Loss of Pledgee's Special Property by a Re-pledge of the Goods obtained by Fraud from prior Pledgee.

The plaintiffs made advances to the pledgors on the security of a quantity of flour. The defendants in entire ignorance of this transaction also made advances to the pledgors on the security of a pledge of the flour, and the pledgors by a fraudulent misrepresentation that they had found a purchaser for the flour procured from the plaintiffs a delivery order for the flour to the defendants. The defendants, in pursuance of the delivery order, obtained possession of the flour, and the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for wrongful conversion.

"This is a very plain case. The action is only maintainable by the plaintiffs in respect of the property they have in the goods. The defendants have entered into no contract with them. The plaintiffs had only a special property as pledgees, that property they gave up under a fraud, and had the pledgors still retained the goods, they could have resumed them. They might have said, You, the pledgors have got these goods by a fraud, and our special property in them is not divested; but they cannot say that against a person who has obtained possession of them from the pledgors *bonâ fide*. The case is somewhat analogous to that where a person is induced to part with his goods by fraud, the contract is voidable and he can recover back the goods; but if the person who has fraudulently obtained the goods part with them to a *bonâ fide* purchaser, the purchaser can hold the property against the person defrauded" (*Babcock* v. *Lawson* (1880), 5 Q. B. D. 284, at p. 286: *Bramwell*, L.J.). (8)

SECTION V.

PLEDGEE'S RIGHT OF USER AT COMMON LAW.

The pledgee cannot use the property pledged, if the property would be the worse for such use.

The pledgee, if the using does not prejudice the property pledged, may make a reasonable use of it at his peril.

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(8) A legal binding conveyance and transfer of personal property may be made so as to oust an equitable lien (*McAllister* v. *Forsyth*, 5 Russell & Geldert, N. S. R. 151; 12 S. C. R. 1; *McDonald* v. *McPherson*, 12 S. C. R. 416).

The pledgee, if he is put to expense in keeping the property pledged, may recompense himself by a reasonable and profitable user of it.

There seems to be very little English authority for the above propositions ; what there is is subjoined :

"If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, etc. ; but if it be such, as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril ; for, whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused ; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such, is not liable to be used ; and to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 917 : *Holt*, C.J.). (9)

The three following passages are extracted from Comyn's Digest, title Mortgage (A.) :

If the custody of the goods is a charge to him the (pledgee) he may use them as a recompence for his charge ; as, he may ride a horse put in pledge (Salk. 522. *R. per* three J. Ow. 124).

So, though the custody be no charge, if the using is no prejudice to the goods, he may use them, but it shall be at his peril if he loses them (Salk. 522, Ow. 124).

If a cow be pledged, he may milk her (Ow. 124).

"It is said, that where the pawnee is at any expense to maintain the thing given in pledge, as if it be a horse or cow, he may ride the horse moderately, and milk the cow regularly, by way of compensation for the charge" (Bac. Abr., Bailments (B.)).

Canadian Cases.

(9) *Rights of Pawnee.*—A., having been arrested at the suit of a third person, placed a mare in B.'s possession on an agreement that B. should go, and if the party arresting proved a demand against A. by his own oath or by that of others, B. was to pay it and to keep the mare until repaid. B. did pay 10*l.*, but without shewing he did so in consequence of its being sworn to ; and the mare remaining with him, he used her once in the plough. A. thereupon, without demand, brought trover, alleging this use of the mare was a conversion, and obtained a verdict. The court granted a new trial. *Per Robinson*, C.J. (*Sherwood*, J., dissenting): "It seems to be clearly settled that the pawnee may use moderately a horse pawned to him in recompense for his meat. If a pawner of a horse were to remit money to the pawnee and pay his debt, but

"The true rules deducible from the common law authorities, and founded upon the presumed intentions of the pawnor, seem to be the following :

"(1.) If the pawn is of such a nature, that the due preservation of it requires some use, there such use is not only justifiable, but it is indispensable to the faithful discharge of the duty of the pawnee.

"(2.) If the pawn is of such a nature, that it will be worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee.

"(3.) If the pawn is of such a nature, that the keeping is a charge to the pawnee, as if it is a cow or horse, there the pawnee may milk the cow and use the milk, or ride the horse, by way of recompense (as it is said) for the keeping.

"(4.) If the use will be beneficial to the pawn, or it is indifferent, there it seems that the pawnee may use it ; as, if the pawn is of a setting dog, it may well be presumed that the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which made him valuable. So books, which will not be injured by a moderate use, may be read, examined, and used by the pawnee.

"(5.) If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, there the use is impliedly interdicted" (Story, ss. 329, 330).

The above rules are clearly framed on, and nearly copied from, what Sir *W. Jones* says at pp. 80, 81, who uses the same examples, viz., a setting dog, clothes or linen, books, horses.

Canadian Cases.

neglect to call for his horse, leaving him to the pawnee to keep, it may be that the bailment would be at an end by paying the debt, but there could be no reason why the pawnee should not continue to use the horse if he continued to keep him for no other reason than that the pawner did not come and demand him." *Macaulay*, J. : "The mare remained in defendant's possession originally with plaintiff's assent upon an understanding that she was to become a pawn in a certain event. Until the event occurred it was a mere naked bailment, and the event never happened, so that the defendant never had her in possession except as a mere depositum. It is clear that a horse pawned may be reasonably worked by the pawnee as an equivalent for its keep, and I can perceive no good reason why a gratuitous bailee should not be equally at liberty to use such an animal so far as to indemnify himself in that way for the expense of feeding. As a mere bailee, therefore, I do not think the extent to which the defendant is proved to have worked the mare would constitute a tortious conversion. I think he was legally entitled to use her while in his hands as a bailee as far as he could have done had she been an actual pawn." (*Forrester* v. *Spencer*, U. C. Q. B. (o.s.) 47.)

SECTION VI.

REDELIVERY OF PLEDGE AT COMMON LAW AND REDEMPTION BY PLEDGOR.

Redelivery.

The pledgee is bound to redeliver the property pledged upon payment or tender of the debt, if he does not he is a wrongdoer.

The above rule of law is established by the subjoined authorities:

"In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt. . . . But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 917: *Holt*, C.J.).

"But by tender of the money, his (the pledgee's) property is determined, and the pledge ought to be restored (Salk. 522, 523; R. 2 Cro. 245; Yelv. 178); and if he refuses to restore the pledge upon tender of the money, trover lies against him (Salk. 522; R. 2 Cro. 245)" (Com. Dig. Mortgage (A.). See, *post*, Section VIII.—Owner's Right of Action).

"If the pawnee be robbed of the goods after tender, he shall answer for them" (*Id.*).

"If a man pledge goods, and tender the money to the pawnbroker (pledgee), and he refuse, this determines the qualified property; and, therefore, if after such tender the goods are stolen, etc., the bailor shall have satisfaction made him in an action of *trover*; for a tender and refusal must in those cases amount to a payment, because otherwise no man could again come to his own, since pawns (pledges) are over the value lent." (Bac. Abr. Bailment (B.).)

The pledgee may redeliver to the lawful owner of the property pledged.

"My impression is, that if a person pledges with another property to which he has no title, and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law, it constantly occurs that where stolen property has been pledged, the pawnbroker is called upon to deliver it up to the rightful owner. If a servant illegally

pledges his master's plate, the servant cannot recover it by an action, since the pawnbroker may inquire who is really the true owner, and deliver it to him. It may be, that a person with whom property is pledged may contract absolutely, and at all events, to deliver back the property to the pledgor; in which case, I agree that the former would be answerable in damages for the breach of such a contract, though the damages might be nominal only. That, however, is not the ordinary result of the common contract. In that case, the person who pledges impliedly undertakes that the property pledged is his own; and if it turns out not to be so, the pledgee may restore it to the lawful owner" (*Cheesman* v. *Exall* (1851), 6 Ex. 341, at p. 343: *Pollock*, C.B.).

"I think that a person with whom property is pledged may set up the *jus tertii*, unless he has entered into an engagement with the person who pledged it to return the property to him. In the ordinary case of a pledge, the pledgee impliedly undertakes to deliver back the property to the pledgor when the sum for which it was pledged is paid. On the other hand, the pledgor impliedly undertakes that the property pledged is his own property, and may be safely returned to him" (*ibid.*, at pp. 344, 345: *Parke*, B.).

"In the case of an ordinary pledge there is no doubt an implied undertaking on the part of the pledgee to redeliver to the pledger the article pledged on payment by the latter of the sum advanced, with interest; but there is on the other hand an implied undertaking on the part of the pledger that the property pledged is his own, or that he has the authority of the owner to pledge it, and that it may be safely delivered back to him. The undertaking on the part of the pledgee to redeliver, however, is not an absolute one, but it is subject to this: that the pledger has the title he warrants himself to have, and if it turns out that he is not the owner, and had no authority from him to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it (see *Cheesman* v. *Exall* (1851), 6 Ex. 341)" (*Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, at pp. 42, 43: *Hawkins*, J., delivering the judgment of the court (*Huddleston*, B., and *Hawkins*, J.)).

The pledgee may redeliver to the pledgor for a special purpose without affecting his security.

"There can be no doubt the pledgee might hand back to the pledgor, as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force and effect of his security" (*North Western Bank* v. *Poynter, Son & Macdonalds*, [1895] A. C. 56, at p. 68; Lord *Herschell*, L.C.).

Redemption by Pledgor.

A pledgor may bring his action to redeem.

If no time be limited for payment, the pledgor may redeem at any time during his life.

If a time be fixed for payment, the pledgor may redeem within that time, though the pledgee be dead. If the pledgor die before the time fixed, his executors may redeem.

If no time be fixed for payment and the pledgor die without redeeming, his executors cannot redeem.

If the pledgee die within the time allowed for redemption and before the pledgor redeems, the latter, within the time allowed, should tender the money to the executors of the pledgee.

There seem to be no recent decisions upon the above principles.

Trover for Hatband set with Diamonds.—Plaintiff was possessed of the hatband and pawned it to one Whitlock for 25*l.*; no time of redemption was limited. The wife of Whitlock (the husband being sick), by the assent of the husband, delivered the hatband to the defendant Davis. Whitlock died, the plaintiff tendered 25*l.* to his widow (her late husband's executrix), who refused it.

Per curiam.—In case of a pawn, he who pledges it has time to redeem it during his life; for it is a condition solely knit by him, and to be performed by him, and the death of him to whom it was pawned is no impediment of the redemption; but it is otherwise of the death of him who pawned it; for his executors cannot redeem it, for it is a condition personal, and, being generally pawned, extends only to the person of him who pawned it: *per Fleming*, C.J. (*Sir John Ratcliff* v. *Davis* (1611), Yelv. 178).

"If a man pledge goods for money lent, he may redeem, though he does not come at the day fixed for payment. So, if no day be appointed for payment, he may redeem at any time (2 Cro. 245). So if the pawnee die, he may tender the money to his executor or administrator (2 Cro. 245; Yelv. 178; 1 Bul. 29). So, if he that pledges dies, his executor or administrator may tender the money (Dub., 2 Cro. 245); for it was said, that the condition is personal, and it ought to be redeemed during his life (Yelv. 178; 1 Bul. 29). If a day be appointed for redemption, and he that pledges dies before, his executor may redeem (1 Bul. 29). If a man pledges goods perishable, and does not redeem them till they are perished, (no time being fixed for the redemption,) debt lies for money: *per* Chief Justice, and not denied by the court (Yelv. 179). So, if the pawnee lose them without his default (Salk. 522)" (Com. Dig. Mortgage (B.)).

Bill brought by the assignee of Cordwell in bankruptcy for redelivery of jewels and plate pledged by Cordwell to defendant, who had also given a promissory note for the delivery over of those goods to the assignee, or the value of them, upon the assignee paying him all that was due. The Statute of Limitations was pleaded.

"There is no colour for the statutes being a bar to this demand: no time being given for their redemption. Cordwell (the pledgor) had time during life to redeem, according to the case in Bulstrode. Then so had the assignee till tender or payment of the money; before which, on the face of the note, *trover* would not lie. It is something like the case of a remainderman expectant on an estate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years: yet he is not bound to do so; therefore if he comes within his time after the remainder attached, it will be good, nor can the Statute of Limitations be insisted on against him for not coming within twenty years after his title accrued by forfeiture. I will not say in general, that there is a right to come into equity in every case to redeem pledged goods: yet there are cases, where it may be. As the pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of the stock, but may sell it, and notwithstanding, the mortgagor may bring a bill here, for an account of what is due, and to have a transfer to him" (*Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278: Lord *Hardwicke*, L.C.).

"There is a great difference between a pawn and mortgage of lands; for if goods be pawned without mention of time for redemption, they may be redeemed after the death of the pawnbroker. . . . Where goods are pawned, the pawnbroker hath but a qualified property, the absolute ownership is in the person that deposits them; and this property cannot be extended beyond the intent for which it was created; and that is only for securing the money lent; for, should the property be thus extended, it would be to the injury of him that has the absolute ownership. Now the intent of the parties in not limiting a time for redemption was plainly in ease of the pledger, and therefore the time of redemption must be during his life; and he cannot be confined to the life of the pawnbroker, for that might fall more to the disadvantage of the person pledging than if a time had been limited; and there are no absolute words to induce such a rigorous construction, contrary to the design of the parties; but if the pledger doth not redeem during his own life, his executor cannot redeem, for then the words and intent both agree to make an absolute property to the pawnbroker" (Bac. Abr. Bailment (B.)).

"But if time be set for the redemption of a pledge, and before the time the pledgor dies, his executors may redeem it, and it shall be assets in their hands; for where there is a time limited, thereby the express words the party hath till the time appointed, and the time appointed is indefinite (*sic*), and not during the life of the pledgor; and therefore if he dies, his executors shall redeem; and therefore the death of either party cannot prejudice (Bulls. 29, 30)" (Bac. Abr. Bailment (B.)).

Redemption by Executor—How far Redeemed Pledge an Asset.

"It has been decided, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid on their redemption" (Williams' Executors, 9th ed., Vol. II., p. 1522).

"Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator" (*ibid.*, p. 1646).

SECTION VII.

SALE OF PLEDGE.

It is presumed throughout this section that there is no special agreement to the contrary.

(a) Pledgor's Right of Sale.

The pledgor may by sale transfer to a purchaser his qualified property in the goods pledged, together with all rights incident thereto.

If several chattels should be pledged for one sum, separate sales can be made by the pledgor of each to different purchasers, subject to the entire claim of the pledgee.

There is very little authority on a pledgor's right of sale; what little there is, is now given.

"Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case, the vendee will be substituted for the pledgor, and the pledgee will be bound to allow him to redeem, and to account with him for the pledge and its proceeds" (Story, s. 350).

A chronometer was pawned by the owner with the defendant, a pawnbroker, and at the time of the pawn, the owner delivered to

the defendant a written paper, authorising him to sell if the chronometer was not redeemed within a year. The owner afterwards sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought an action of *trover* for the chronometer.

"There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favour of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if what this pawnor transferred, or sought to transfer, was a mere right of action. But this is not so; he transfers the property in the chattel, qualified, indeed, by the right existing in the pawnee, but still a right of property, and the right of action afterwards exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser.

"We do not feel at all pressed by the argument *ab inconvenienti*, urged by Mr. Petersdorff. 'If several chattels,' he asked, 'should be pawned for one sum, could separate sales be made of each to different purchasers?' We answer, undoubtedly they may; the pawnee will, of course, not be bound to part with any of the chattels until his whole debt is paid; but, subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made. Again, it is said, suppose the chattel is injured by default of the pawnee, while in his custody, who is to sue the pawnee, the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff, if the action be for a breach of contract express or implied, unless a new one be made with the purchaser: the owner for the time being is the proper plaintiff, if the injury be by the destruction or conversion of the chattel: just as, in the case of a carrier, the original employer is the person to sue for the loss for negligent carriage, or other breach of contract—the other subsequent purchaser for the conversion after the purchase.

"That in ordinary cases of bailment, not by way of pawn, the bailor may sell, is a proposition admitting of no doubt; indeed, it

is assumed to be law by Lord *Holt*, in one of the cases relied on by Mr. Petersdorff (*Rich* v. *Aldred* (1705), 6 Mod. 216), where he says: 'If A. bail goods to C., and after gives his whole right in them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailment was not thereby transferred to B.'; and there does not seem to be any solid ground of distinction, in this respect, between a bailment by way of pawn and any other bailment.

"With so little then, of direct authority, we must act on the general principle, that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; that as an incident to such property, he has the right of sale, and that after the sale the purchaser has the same interest in the chattel which the pawnor had" (*Franklin* v. *Neate* (1844), 13 M. & W. 481, at pp. 485, 486: *Rolfe*, B., delivering the judgment of the court).

(b) Pledgee's Right of Sale at Common Law.

A pledgee may at common law by sale transfer to a purchaser his special property in the goods pledged.

If there is a time fixed for the repayment or redemption of the goods and that time has expired, the pledgee has a right to sell of his own accord.

If there is no time fixed for the repayment or redemption of the goods, then *after demand* upon the pledgor for the payment of what is due, the pledgee has a right to sell.

A pledgee of stock has no right of sale during the currency of the loan. The identical stock must be restored. (10)

The passages from Comyns and Story and the judicial statements now given amply establish the above rules.

"The pawnee has such a property as he may assign to another (Ow. 124)" (Com. Dig. Mortgage (A.).

"It is very certain that, at the common law, he (the pledgee) cannot alienate the property absolutely, nor beyond the title actually possessed by him, unless in special cases" (Story, s. 322).

"If the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is a security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity" (Story, s. 308).

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(10) When stock pledged for an advance is sold before default, such sale is tortious, and if stock loaned it will be treated as a sale. Ordinarily, if property is pledged, the same property is to be returned after satisfaction of the pledge, and that rule applies to stock, if it can be identified (*Boyd*, C.: *Carnegie* v. *Federated Bank*, O. R. 5, 418; O. R. 8, 75; see also *Mara* v. *Cox*).

"It is clear, by the common law, that in cases of a mere pledge, if the stipulated time is fixed for the payment of the debt, and the debt is not paid at the time, the absolute property does not pass to the pledgee. This doctrine is, at least, as old as the time of Glanville. If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and, upon a tender of the debt, he may at any time be compelled to restore it" (Story, s. 346).

1. Action of *trover* by plaintiff who had deposited 200 dozen of wine in the defendant's cellar, which was to remain as security for the money advanced to the plaintiff by the defendant. Bills were accepted for the money advanced.

"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security, to indemnify a party against a loan of money, it is more than a pledge (*quære* lien). The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: 'If I (the borrower) repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself'" (*Pothonier* v. *Dawson* (1816), Holt Rep. N. P. 383, at p. 385: *Gibbs*, C.J.).

2. "A deposit with power to hold, and a deposit with power to sell, are surely quite different things. Very recently there was a discussion whether there was a mercantile usage in London giving such a power of sale; but it was by no means taken as clear that to every deposit of goods by way of security a power of sale is necessarily incident" (*Micklethwaite* v. *Merrill* (1852), 19 L. T. (o.s.) 61: *Erle*, J.).

3. "The principle that the pawnee of stock has no right to sell, and that if he does so he must be charged with the price it produced, whatever may be the subsequent reduction in its value, is established by the case of *Ex parte Dennison* (1797), 3 Ves. 552" (*Langton* v. *Waite* (1868), L. R. 6 Eq. 165, at p. 173: *Malins*, V.-C.). (11)

4. "As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due to him. The law is

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(11) *Carnegie* v. *Federal Bank.*

thus laid down by Mr. Justice *Story* in his book on the Law of Bailments (7th edit., plac. 308) : 'If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement ; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor, require the pawn to be sold.' I can see no reason why the principle which applies to a pledge of physical chattels should not equally apply to a pledge of a *chose in action*" (*France* v. *Clark* (1883), 22 Ch. D. 830, at pp. 833, 834 : *Fry*, J. ; see also *Pigot* v. *Cubley* (1864), 15 C. B. (N.S.) 701, and *Martin* v. *Reid* (1862), 11 C. B. (N.S.), 730).

5. "A special property in the goods passes to the pledgee in order that he may be able—if his right to sell arises—to sell them. In all cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee" (*Ex parte Hubbard* (1886), 17 Q. B. D. 690, at p. 698 : *Bowen*, L.J.).

6. "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only), to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale" (*Ex parte Official Receiver* ; *In re Morritt* (1886), 18 Q. B. D. 222, at p. 232 : *Cotton*, L.J. (in which judgment *Lindley* and *Bowen*, L.JJ. concurred)).

(c) Pledgee has no Right of Foreclosure.

1. "If this had been land which had been mortgaged, the defendants could not have held it irredeemable without coming into this court for a foreclosure ; but the thing pledged in the present case is not land, but personalty, viz., East India stock ; and it has been determined, that in such case the party has no occasion to come into this court for a foreclosure. That point was so settled in the case of *Tucker* v. *Wilson* (1714), 1 Peere Wms. 261" (*Lockwood* v. *Ewer* (1742), 9 Mod. 275, at p. 278 : *Hardwicke*, L.C.).

2. The defendant deposited with the plaintiff certain bonds as security for a debt. A bill was filed praying for foreclosure of the equity of redemption in the bonds or for a sale.

"The plaintiff is in the position of a mere pledgee at law of certain chattels, and I do not think that a person in that position has the same right of foreclosure as a mortgagee by deposit of the

title deeds of land. The principle upon which the court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the court simply removes the stop it has itself put on. Then, when there is a deposit of title deeds, the court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title. There will be an order for sale of the bonds by auction, but as there seems to be a good reason why the plaintiff should not be forced to part with them, I will give him liberty to bid, he not conducting the sale" (*Carter* v. *Wake* (1877), 4 Ch. D. 605, at p. 606: *Jessel*, M.R.).

3. One James Fraser obtained judgment against one Byas, for 208*l.* odd and costs; as a security for the debt Byas deposited with J. Fraser a picture. J. Fraser assigned the debt and transferred the picture to the plaintiff. After Byas's death the plaintiff brought this action against his executors asking for foreclosure, or in the alternative for a declaration that the defendants were not entitled to redeem. The plaintiff moved for judgment.

"The plaintiff might have convinced me if it had not been for the case of *Carter* v. *Wake* (1877), 4 Ch. D. 605. But he has failed to show such conflict of authority as would enable me to depart from that case. I therefore order a sale of the picture. If both parties can agree to it, the sale may be by auction" (*Fraser* v. *Byas* (1895), 13 R. 452, at p. 453: *North*, J.).

Pledge available for further sums lent.

Plaintiff pawned some jewels and plate to the defendant, Knight, a goldsmith, for 110*l.*, redeemable in twelve months. Knight, two days after, pawned them with the defendant Metcalfe for 200*l.* and afterwards borrowed the further sums of 36*l.* and 50*l.* of Metcalfe on promissory notes, to be repaid on demand. Knight became a bankrupt and insolvent. Bill by the plaintiff to redeem from Metcalfe, who by answer insisted that although he took promissory notes for repayment of the sums of 36*l.* and 50*l.* upon demand; yet it was agreed at the same time that the pawn should also remain as a security for those sums, as well as for the money before lent; but no person was then present, therefore he could not prove the agreement.

The Lord Chancellor (Lord *Harcourt*), said it was natural to suppose, that although Metcalfe took promissory notes, yet his having a pawn in his hands of greater value might be the inducement to him to lend, and took time to consider of it; and at last decreed that the plaintiff must pay, as well the 36*l.* and 50*l.* as other moneys due (*Demainbray* v. *Metcalfe* (1715), 2 Vern. 691 & 698). See *ante*, p. 138, Section II.—(c) Title of Pledgor to Goods and Chattels pledged.

Effect of sale on True Owner.

"The true owner of goods does not lose his property by the sale made by the possessor of them, unless it were in market overt; and in the cases stated, no regard is had to the vendee's ignorance of the vendor's want of title; no regard to the vendee's coming rightfully to them as a purchaser without notice; no regard to the vendor's having the lawful possession of them" (*Hartop* v. *Hoare* (1733), 3 Atk. 44, at p. 49: *Lee*, C.J.). See also *ante*, p. 138, Section II.—(c) Title of Pledgor to Goods and Chattels pledged.

(d) Pledgee's Action for the Debt or Deficit after Sale at Common Law.

Though the borrower tender the money and recover the goods in an action of *trover*, yet the pawnbroker (pledgee) may have an action of *debt* for his money; because though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came (Bac. Abr. Bailment (B.)).

So if a man lend perishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of *debt* for his money, because the duty continues (*ibid.*).

It was likewise held by the Chief Justice (*Fleming*) that if the pawn be of a perishable nature, as corn, oil, etc., and no time of redemption limited, and the party stays till it is perished in nature and spoilt, forasmuch as there is no default in him who took the pledge, he shall have debt for his money, and the other no remedy for his pawn, for the law of this part hath dissolved the contract; for things in their nature perishable cannot be preserved (*Sir John Ratcliff* v. *Davis* (1611), Yelv. 178).

If I pawn goods to A. for such a sum, A. may have debt for the money, notwithstanding his having a pawn (*per Holt*, C.J.: Anonymous (1702), 12 Mod. 564, case 951).

Where money is generally lent upon a pledge, it will not deprive the lender of his remedy against the person; and to discharge the person of the borrower, there must be a special agreement to stand to the pledge only (*The South Sea Co.* v. *Duncomb* (1732), 2 Stra. 919).

Plaintiff, a pawnbroker, advanced to the defendant 15*l.*, and a gun was pledged as a security for the repayment. The transaction was rather to be a simple loan than a pawning under the Act.

Lord *Ellenborough* was of opinion, under these circumstances, that the plaintiff was entitled to recover, although the gun had not been returned or tendered; the defendant might enforce the return by bringing his action of *trover* (*Lawton* v. *Newland* (1817), 2 Stark. 72; see also *Scott* v. *Parker* (1841), 1 Q. B. 809).

Pledgee's Action for Deficit after Sale.

"It is a contract of pledge, and if the article pawned does not realise the amount lent on it he may bring an action for the deficit. . . . There is nothing which excludes the common law right of the pawnbroker to recover whatever sum he may have advanced beyond the value of the pledge" (*Jones* v. *Marshall* (1889), 24 Q. B. D. 269, at p. 271: Lord *Coleridge*, C.J.).

SECTION VIII.

OWNER'S RIGHT OF ACTION.

The owner may maintain *trover* for his goods and chattels when his pledgee refuses duly to redeliver them, or when his pledgee has wrongfully sold or sub-pledged them, or otherwise converted them to his own use.

The pledgee's refusal may be qualified. (See *Vaughan* v. *Watt* (1840), 6 M. & W. 492, and see also *ante*, p. 83, Chapter II.—Deposits; Section VIII.—Action for the return of deposit or its value, and damages for its detention.)

The authorities in support of the above proposition are referred to by *Erle*, C.J., in his judgment in the next case, and it is there stated what damages are recoverable.

If the pawnee refuses to restore the pledge upon tender of the money *trover* lies against him. (Salk. 522; R. 2 Cro. 245; Com. Abr. Mortgage (A.).)

"In *trover* by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that on the 28th of January Stear sold the brandy, and on the 29th handed over the dock warrant to the vendees, who on the 30th took actual possession.

"Upon these facts, the questions are: first, was there a conversion? and, if yes—secondly, what is the measure of damages? To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and although the sale alone might not be a conversion, yet, by delivering over the dock warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan; for which purpose the dock warrant would have been an important instrument. We decide for the plaintiff on this ground: and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises. The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrongdoer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien: and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.

"It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

"If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more; and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion; but, in substance, it is the same cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid. There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery* v. *Viall* (1860), 5 H. & N. 288. There, the

defendant had sold sheep to the plaintiff; and, because there was delay in the payment of the price by the plaintiff, the defendant re-sold the sheep. For this wrong the court held that *trover* lay, and that the plaintiff was entitled to recover damages; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the re-sale, yet the defendant as an unpaid vendor had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff, from the value of the sheep at the time of the conversion.

"In Story on Bailments, s. 315, it is said: 'If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted; and it seems, that, by the common law the pawnee, in such action for the value has a right to have the amount of his debt recouped in damages.' For this he cites *Jarvis* v. *Rogers* (1819), 15 Mass. R. 389. The principle is also exemplified in *Brierly* v. *Kendall* (1852), 17 Q. B. 937. There, although the form of the security was a mortgage, and not a pledge; and although the action was trespass, and not *trover*; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff, and sold them. For this wrong he was liable in trespass: but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

"On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40*s*." (*Johnson* v. *Stear* (1863), 15 C. B. (N.S.) 330, at pp. 334, 335, 336, 337: *Erle*, C.J.).

"I think, however, of late the tendency of the courts has been to treat this action (of *trover*) with more common sense than it had been previously treated. Just as in other actions of tort it is held

that a person to whom a wrong has been done can only recover the damages which flow from the wrong ; so in an action of *trover* it is the tendency of the courts to apply the same rule. I will refer in support of this view to the cases of *Brierly* v. *Kendall* (1852), 17 Q. B. 937, and *Chinery* v. *Viall* (1860), 5 H. & N. 288, where it was held that the person whose goods have been converted was not entitled to recover their full value" (*Hiort* v. *London and North Western Rail. Co.* (1879), 4 Ex. D. 188, at p. 199: *Thesiger*, L.J.).

A sub-pledge is not necessarily repugnant to a contract of pledge.

Plaintiff deposited with one Simpson four debentures of the British Slate Co., Limited, as security for the due payment at maturity of a bill of exchange. Simpson, before the dishonour of the bill of exchange, deposited the debentures with the defendant, professing to give a security on them for repayment of a debt of his own, which was different from the amount of the bill of exchange. The question raised was whether the plaintiff was entitled to recover in detinue the possession of the debentures, he neither having paid or tendered the amount for which he had pledged them with Simpson.

"Now I think that the sub-pledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract. There may be cases in which the pledgor has a special personal confidence in the pawnee, and therefore stipulates that the pledge shall be kept by him alone, but no such terms are stated here, and I do not think that any such term is implied by law. In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, and that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub-pledge ; at least the plaintiff should try the experiment whether, on bringing the money for which he pledged those debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money (so long at least as it purports to transfer no more than the pledgee's interest against the pledgor) is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts, and is in the civil law (and according to *Mores* v. *Conham* (1610), Ow. 123, in our own law also) a regular incident in a pledge. If it is done too soon or to too great an extent, it is doubtless unlawful, but not so repugnant to the contract as to be justly held equivalent to a renunciation of it . . .

"But the latest case, and one which I think is binding on this court, is that of *Johnson* v. *Stear* (1863), 15 C. B. (N.S.) 330; and I think that the decision of the majority of the Court of Common Pleas in that case is an authority, that at all events there remains in the pawnee an interest, not put an end to by the unauthorized transfer, such as is inconsistent with a right in the pawnor to recover in detinue" (*Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, at pp. 615, 616: *Blackburn*, J.).

Where goods are wrongfully pledged the owner may recover them from the pledgee.

"It was not, and could not be denied, that at common law the plaintiffs would be entitled to recover. They were the owners of the article pledged, and entitled to the possession of it, for the bailment to Smith, the pawner, had been determined when it was pledged to the defendant: see *Cooper* v. *Willomatt* (1845), 1 C. B. 672, where it was held that on a wrongful sale by a bailee to a *bonâ fide* vendee, the latter was liable in trover to the bailor. Here, instead of a wrongful sale, there was a wrongful pledge; but the same law applies, and the delivery back to the pawner after notice of the plaintiff's title and demand was clearly a wrongful conversion, unless it was protected by the provisions of the 25th section [of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93)], see *Peet* v. *Baxter* (1816), 1 Stark. 472; *Packer* v. *Gillies* (1806), 2 Camp. 336*n*; *Hoare* v. *Parker* (1788), 2 T. R. 376" (*Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, at p. 42: *Hawkins*, J., delivering the judgment of the court (*Huddleston*, B., and *Hawkins*, J.)).

Stolen Goods.

At common law the owner may maintain trover against the pledgee of stolen goods and chattels. (12) At common law the owner cannot maintain trover against a *bonâ fide* pledgee of goods and chattels acquired by a contract tainted with fraud.

Under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, upon conviction of the guilty person the owner in either of the above cases can maintain trover or obtain restitution of the goods and chattels as therein provided.

See also *ante*, p. 138, Section II.—(c) Title of Pledgor to Goods and Chattels pledged, and the following authorities:—

Trover against a pawnbroker for goods pledged with him, which had been stolen. It appeared that the goods in question were stolen from the house of the plaintiff, and had been pawned by a woman

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Canadian Cases.

(12) See *Edwards* v. *Kerr*, 13 C. P. O. 24, *ante*, p. 87.

of the name of Brown; but that she had been tried for the felony, and acquitted, on the absence of a material witness. Lord *Ellenborough* held, that the action well lay, and the plaintiff had a verdict (*Packer* v. *Gillies* (1806), 2 Camp. 336*n*).

Difference between the cases of Stolen Goods and Goods Acquired under a Contract tainted with Fraud.

"I do not think that, apart from statute law, a *bonâ fide* purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud stands in precisely the same relation to the original owner as a purchaser of stolen goods, without notice of the theft, in market overt. In the latter case the original owner and the purchaser in open market are to this extent *in pari casu*, that neither has done ought to mislead the other; whilst in the former case the original owner has intentionally given his fraudulent vendor an *ex facie* absolute and valid title to the goods, upon which purchasers without notice of the fraud are entitled to rely. I have great difficulty in supposing that the legislature, as an incentive to the prosecution of crime, deliberately intended in the the case where the property has been passed by the act of the original owner to deprive the honest purchaser both of his goods and of his money" (*Bentley* v. *Vilmont* (1887), 12 App. Cas. 471, at p. 477: Lord *Watson*).

"The language of the clause [s. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96)] leaves no room for making any distinction between goods obtained by fraudulent pretences without the property passing, and goods obtained by the same means under a voidable contract of sale" (*ibid.*, at p. 478). This distinction has been made by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

Section 24 (1) enacts that, where goods have been *stolen* and the offender is prosecuted to conviction, the property in the goods so stolen *revests* in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate *dealing* with them, whether by sale in market overt or otherwise. ("Dealing" would seem to include pledging.)

And by s. 24 (2) it enacts that, notwithstanding any enactment to the contrary, where goods have been *obtained by fraud or other wrongful means not amounting to larceny*, the property in such goods shall *not revest* in the person who was the owner of the goods, or his personal representative, by reason *only* of the conviction of the offender.

SECTION IX.

TITLE OF THIRD PERSON TO GOODS AND CHATTELS.

See *ante*, Section VI., at p. 154.—Redelivery of Pledge at Common Law and Redemption by Pledgor.

SECTION X.

STATUTE OF LIMITATIONS.

We have seen (*ante*, p. 156, Section VI.—Redemption by Pledgor) that if no time be limited for payment the pledgor may redeem at any time during his life. The Statute of Limitations would seem, therefore, not to begin to run until a demand by the pledgor has been made and a refusal given by the pledgee, or until there has been some other conversion on the part of the pledgee. See *ante*, p. 165, Section VIII.—Owner's right of action, and the cases following :

1. Bill brought by an assignee under a commission of bankruptcy against Cordwell, for the redelivery of jewels and plate pledged by him to the defendant, who had also given a promissory note for the delivery over of those goods to the assignee, or the value of them, upon the assignee's paying him all that was due. The Statute of Limitations was insisted on by way of defence.

"There is no colour for the statutes being a bar to this demand: no time being given for redemption, Cordwell had time during life to redeem, according to the case in Bulstrode. Then so had the assignee till tender or payment of the money ; before which, on the face of the note, *trover* would not lie" (*Kemp* v. *Westbrook* (1749), 1 Ves. Sen. 278 : Lord *Hardwicke*, L.C.).

2. An action was brought to recover the possession of title deeds from a pledgee to which the Statute of Limitations was pleaded.

"The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositee or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner.

The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion" (*Spackman* v. *Foster* (1883), 11 Q. B. D. 99, at pp. 100, 101 : *Grove*, J.).

3. The plaintiff was the owner of the lease of a house. In 1881, more than six years before the commencement of the present action, the plaintiff's son deposited the lease with one Bates, to secure an advance of 150*l*. Within six years of the commencement of the action, Bates became bankrupt, and in 1889 the trustee under his bankruptcy sold his business to the defendant, including the debt of 150*l*., and handed over to him the lease which had been deposited as security. Subsequently the plaintiff demanded the return of the lease from the defendant, and upon his refusal to give it up commenced this action for detinue and conversion of the lease, to which the defendant pleaded the Statute of Limitations, 1623 (21 Jac. 1, c. 16).

"What the defendant relies on is that Bates converted this lease to his own use more than six years ago, and it is contended that this was the first wrongful conversion, and that the statute runs from the time when that first wrongful conversion occurred. The case of *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206, was cited in support of this contention at the trial before *Charles*, J., and especial reliance was placed on a passage in the judgment of *Willes*, J. (at p. 209), who says : 'It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded.' But it is plain that *Willes*, J., was there dealing with a case in which the defendant himself and nobody else was charged with the wrongful detention. The defendant himself was the sole wrong-doer, and the language of the passage relied upon, though general in its terms, must be applied to such circumstances as those in that case. Moreover, *Willes*, J., immediately goes on to give the following illustration : 'As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment'—language which shows that what he meant was, that where there was a valid cause of action against the defendant by the plaintiff, the statute began to run from the time when that cause of action arose.

"In the present case, it is sought on behalf of the defendant to extract from that decision this doctrine, that if one man is guilty

of a wrongful conversion, and afterwards a second man is guilty of a wrongful conversion of the same thing, then the cause of action against the second man is barred by the statute if the cause of action against the first man accrued more than six years before action, although the conversion in respect of which the second man is sued may have occurred within the six years or indeed within six months. It is said that to hold otherwise would be contrary to reason and natural law; that is to say, that because the legislature, in order to prevent litigation after a certain period, has said that no action shall lie against A. in respect of an act done by him more than six years before action brought, therefore B. cannot be sued in respect of an act done by him within the six years. To me that proposition seems contrary to reason" (*Miller* v. *Dell*, [1891] 1 Q. B. 468 at pp. 470, 471: Lord *Esher*, M.R.).

SECTION XI.

EXECUTION.

In a judgment against the pledgor the goods pledged cannot be seized by the sheriff unless he satisfies the claim of the pledgee.

In a judgment against the pledgee the goods pledged can be seized and possession of them kept by the sheriff in respect of the special property of the pledgee in them.

"The general rule of law is, that the sheriff can seize only such things as he can sell. That rule of law still remains, except so far as it has been modified by the Act of 1 & 2 Vict. c. 110 (The Judgments Act, 1838); but that statute does not affect the present case. If we consider the nature of a lien, and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods. The case is quite different from those referred to, in which goods were let on hire for a certain period, because there the person hiring the has the absolute use of the goods for a particular term, and that interest may be disposed of. Here, the interest cannot be transferred to any other individual; it continues only as long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant. Then as the sheriff cannot sell, neither, by the general rule of law can he seize" (*Legg* v. *Evans* (1840), 6 M. & W. 36 at pp. 41, 42: *Parke*, B.).

If a debtor has pawned his goods and an execution afterwards issues against him, the duplicates alone can be seized, and the goods themselves cannot be taken without payment of the money for which they were pawned (*Rogers* v. *Kennay* (1846), 9 Q. B. 592), where Lord *Denman*, C.J., said *Legg* v. *Evans* (1840), 6 M. & W. 36, was directly in point.

Execution—Receiver against Pledgee.

"The sheriff having seized, had taken possession amongst other things of a number of goods in pledge: in which, therefore, the pawnbroker had a qualified property. As to some of the pledges, more than twelve months and a week had expired and some of the goods were irredeemable. As to others less than twelve months had expired. It is conceded that the sheriff could not be compelled to go out of possession of those articles which had been pledged for more than twelve months. It is admitted that he is entitled to remain in possession of the other goods also unless the appointment of the receiver has intercepted his rights. It is not disputed that if they remain in his possession until the time for redemption expires, the sheriff will have an interest in the property. It is clear to me that the sheriff has in the meantime also an interest in the goods; which are held as security for the money advanced on them, and to secure which the goods were pledged. When I say it is a security, I do not think it is within 1 & 2 Vict. c. 110 (The Judgments Act, 1838), s. 12, which, I think, means only securities *ejusdem generis*, as the securities particularly mentioned in the section. And I doubt whether the section can be held to apply to goods in pledge. But independently of that, the sheriff has a right to the possession of the goods in respect of the qualified property the pawnbroker has in them: and he has a right to sell them when the twelve months and a week shall have expired, and to make a good title to anyone to whom he sells, and has a right to receive the money; and in respect of the redeemable pledges it appears to me the appointment of the receiver has not intercepted his right; and the sheriff has a right to hold the goods by way of deposit, and they cannot be redeemed except by payment of the money secured by the pawners, and the person for whom the sheriff holds the goods is entitled to any money paid for redemption" (*In re Rollason* (1887), 34 Ch. D. 495, at p. 497: *North*, J.).

SECTION XII.

DISTRESS.

Goods entrusted to persons carrying on public trades to be by them dealt with, wrought, or managed in the way of their trade, *e.g.* pawnbrokers, are exempted from distress.

"The action is brought by a pawnbroker against his landlord for distraining for arrears of rent goods which had been pledged with him in the way of his trade of a pawnbroker. The governing point is whether goods which have been deposited with a pawnbroker as security for advances are protected from distress. By our law, goods intrusted to persons carrying on public trades, to be by them dealt with, wrought or managed in the way of their trade, are exempted from distress; and many judges have attempted to lay down a rule which should embrace all exemptions: but no very well defined principle is to be found in any of the cases; and in applying it we must be guided as well as we can by the specific instances which have from time to time occurred. It seems to me that the goods now in question fall within the description of goods intrusted to one who carries on a public trade, to be managed and dealt with by him in the way of his trade, and which he had a right to hold until the sums advanced by him upon them were repaid to him. I must confess I am unable to discover any difference in principle between the case of a pawnbroker and that of a wharfinger, factor or warehouse-keeper. In most cases, these latter have nothing more to do with the goods than to keep them safely,—the ordinary duty of a simple bailee. So, the pawnbroker is bound to take care of and safely keep the goods intrusted to him, and he receives a profit for so doing in the high rate of interest allowed by the statute. I am clearly of opinion that those goods were exempted from distress on the principle above stated. . . . In distraining these goods the defendant was an absolute wrongdoer. The landlord had no colour of right to take them The bailee, therefore, is entitled to the full value of the goods. He may retain out of that the sums he has advanced upon them and the interest, and he will be liable to hand over the surplus to the respective owners of the goods" (*Swire* v. *Leach* (1865), 18 C. B. (N.S.) 479, at pp. 491, 492: *Erle*, C.J.; see also *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77 (a case of goods warehoused), following the above case, *post*, Chapter IX.—Hire of custody; Section II.—Warehousemen, (d) Distress; and see also *post*, Chapter VIII.—Hire of Work, Labour and Services; Section X.—Distress).

SECTION XIII.

FACTORS AND THE FACTORS ACTS.

Prior to the Factors Acts it would not have been necessary to have included factors under this chapter ; and though factors are bailees, yet their duties and rights rather fall under the subject of agency than that of bailments. The reader must not expect under this chapter to find any law relating to factors which belongs more properly to the law of agency than to that of bailments.

Definition of Factor.

"*Factor* [facteur, Fr.], a substitute in mercantile affairs ; an *agent employed to sell* goods or merchandise consigned or delivered to him by or for his principal for a compensation commonly called factorage or commission. Hence he is often called a commission-merchant or consignee ; and the goods received by him for sale is [*sic*] called a consignment" (Wharton's Law Lexicon, 1848).

A mere Pawnee is not a Factor.

"A mere pawnee is neither a factor nor an agent, nor does he hold the goods in trust for the principal, the owner, and consequently he does not come within the words of the Act (28 Geo. 3, c. 37, s. 21)" (*Att-Gen.* v. *Trueman* (1843), 11 M. & W. 694 at p. 720 : Lord *Abinger*, C.B.).

A factor entrusted with the goods has *at common law* a lien on the goods in his possession for his general balance, but has, *at common law*, no power to pawn or pledge such goods.

"Lord *Tenterden* thus states the law (Abbott on Shipping, 5th edit., pt. 3, ch. 9, s. 19, p. 391). 'If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do : and as, in the case of actual possession, although a factor might sell the goods, and thereby bind his principal, because his employment and authority are to sell, but could not pawn or pledge them because he is not by his employment authorised so to do, so, before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by endorsing or delivering over the bill of lading *as a pledge*.' (13)

Canadian Cases.

(13) Fry, a music teacher at Beardstone, Ill., wrote to Kline & Co., at Chicago, that he had a customer, named Johnson, to whom he could sell a piano, and desiring them to ship one in their own name to be subject to their order,

"The proposition that a factor is not by his employment authorized to pawn or pledge goods entrusted to him, was for many years much controverted in point of fact. But it having been once decided as a matter of law that he was not so authorized, the courts adhered to what had been decided.

"The law in this respect has been altered by 5 & 6 Vict. c. 39 (The Factors Act, 1842), as will be shown hereafter: but the legislature did not alter in the first Factors Act, 4 Geo. 4, c. 83 (The Factors Act, 1823), except in the case of consignment by sea. In *McCombie* v. *Davies* (1805), 7 East 5, the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts" (*Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at pp. 363, 364: *Blackburn*, J.).

The following are the various Factors Acts which have been passed from time to time, viz.:

(1.) In 1823, 4 Geo. 4, c. 83;
(2.) In 1825, 6 Geo. 4, c. 94;
(3.) In 1842, 5 & 6 Vict. c. 39, and
(4.) In 1877, 40 & 41 Vict. c. 39.

All the above statutes were repealed by the present Factors Act, 1889 (52 & 53 Vict. c. 45).

A valuable abstract of the first two Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, indicating what Lord *Tenterden* thought was their effect is contained in the 5th edition of Abbott on Shipping, pt. 3, ch. 9, s. 16, and is given at length in *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at pp. 360, 361, 362. What led to the passing of the Factors Acts will appear from a perusal of the following judicial statements:

What led to the Factors Acts.

1. "The result of that state of the law with respect to agents employed to sell [instances exceptional to the rule that no man can give a better title to goods than he has himself, and that the real

Canadian Cases.

Fry to pay freight charge in case of no sale, and return piano to plaintiffs. Kline & Co., not having a piano, handed Fry's letter to plaintiff, who shipped a piano as requested by Fry. The piano was received by Fry, and by him sent to Toronto, where he pledged it with defendant, a pawnbroker:—*Held*, that there was no sale to Fry of the piano, as it never was intended that the property should pass to him:—*Held*, also, that Fry was not an agent within the meaning of the Factors Act (R. S. O. 1887, c. 121 (now R. S. O. 1897, c. 150)), so as to enable him to pledge the piano, nor (*per Rose*, J.) was he an agent "entrusted with the possession of goods" (*Bush* v. *Fry*, 15 O. R. 122).

owner is not bound, except to the extent of an interest which he has parted with, or an authority which he has given], led to the course of legislation which is known by the general description of the Factors Acts; because it was held by the courts of law that the case of a pledge of goods by a factor intrusted with the possession of goods, and authorized to sell them, fell within the general rule to which the instances above enumerated are exceptions, and that it did not fall within the exceptions by reason of a pledge being an ordinary and accustomed transaction to be entered into by a person intrusted as agent to sell, or perhaps more properly by reason of the courts of law having treated a pledge as being out of the scope of an authority to sell.

"The legislature seem to have considered that to be too narrow a view of the proper scope of the authority of an agent to sell; and they were no doubt induced to think so by reason of the altered mode of conducting mercantile transactions in modern times, and because it had become a usual and accustomed course for factors intrusted with goods for sale, to make advances to their principals either in money or by the acceptance of bills against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money dealers. But, whatever may have been the reason, it is clear that that was the particular evil which the legislature sought to remedy by the Factors Acts. And if it be proper, in construing a statute, to look at the mischief intended to be remedied—which Lord *Coke* says is one of the rules for construction of Acts of Parliament—one would construe such a statute with the expectation of finding that the legislature would deal with the class to which persons who in the usual course of business advance money on goods coming to them for sale belong, and who previously could not pledge beyond their own advances, because the authority of the agent, as between himself and his principal, was limited to contracts of sale, and not capable of being extended by construction to contracts of pledge. That anticipation of what the legislature intended by the Factors Acts, if we are to rely upon a series of decisions upon them, to some of which reference has been made, and all of which are in harmony, would turn out to be correct, because it has from time to time been held that, notwithstanding general terms used here and there throughout those Acts, which, taken by themselves, might be held to include all agents or persons intrusted, those general expressions are to be construed with reference to the general scope and object of the Acts as well as the particular language used, so as to limit their operation to the case, first of persons intrusted as agents" (*Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, at pp. 277, 278 : *Willes*, J.).

2. "When, however, one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it. Originally, it was thought right that factors who were entrusted with the right of selling goods for others, if they chose to make sales on their own account, should be dealt with as competent to make a title to the goods. [See 4 Geo. 4, c. 83.](14) That was extended by the second Act [6 Geo. 4, c. 94] to a power to mortgage; but in each case of the first two Acts there was a proviso that the person who so dealt with the factor must have dealt with him not knowing that he occupied the position of factor, because if he knew that he occupied that position he was not to be entitled to have the benefits of those Acts. (14)

"Then at last came the 5 & 6 Vict. c. 39, by which a person dealing with a factor is protected. How is he protected? It is there enacted that 'any agent entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide*, made with such agent so entrusted'" (*Vickers* v. *Hertz* (1871), L. R. 2 H. L. Sc. 113, at p. 115: Lord *Hatherley*, L.C.).

3. "The law upon the subject [advances to agents for sale], must, I think, be taken to be very clearly expressed in the statute 5 & 6 Vict. c. 39, and so much of the preceding statutes, 4 Geo. 4, c. 83; 6 Geo. 4, c. 94, as is not repealed or controlled by the more recent Act (40 & 41 Vict. c. 39). For a long period the state of the law had been in a most unsatisfactory state as regards mercantile dealings, and now that it has undergone very great changes and improvements, it may be said without irreverence that the former law was hardly creditable to British jurisprudence. The narrow and strict rules of the common law upon which the earlier decisions were founded, although those were in themselves just and not very inconvenient when applied to what may be called domestic dealings—to the sale of a flock of sheep or a waggon-load of corn in fair or market—were found to be inapplicable to a great variety of matters necessarily incident to the transactions which take place between merchants, and to present impediments to the free course of mercantile business and therefore

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(14) Where the defendant purchased goods from A. without notice that A. was an agent, and A. having sold such goods in his own name, it was held that the defendant could set off the debt due from A. personally in the same way as if A. had been the principal (*Bowmanville Machine Co.* v. *Dempster*, 2 S. C. R. 21 (appeal from Supreme Court of Nova Scotia)).

disadvantageous to the community. To remedy this inconvenience the Factors Acts (4 Geo. 4, c. 83, and 6 Geo. 4, c. 94), were passed, and they were soon found to be insufficient, and especially with respect to advances made to agents or factors. For this reason the statute 5 & 6 Vict. c. 39 was passed, the title of which indicates its general object (an Act to amend the law relating to advances *bonâ fide* made to agents intrusted with goods)" (*Kaltenbach* v. *Lewis* (1883), 24 Ch. D. 54, at p. 61: *Bacon*, V.-C.).

THE FACTORS ACT, 1889. (15)

(52 & 53 Vict. c. 45.)

"An Act to amend and consolidate the Factors Acts [The Factors Acts, 1823 to 1877; see 40 & 41 Vict. c. 39, s. 1]."

The provisions of the Factors Act, 1889, are to be construed in

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(15) Previous to the confederation of the British North American provinces, Upper and Lower Canada (now Ontario and Quebec), formed the province of Canada, and the legislature of these united provinces passed the Act, Consolidated Statutes of Canada, 1859, c. 59, intituled, "An Act respecting the protection of persons who receive assignments and enter into contracts in relation to goods entrusted to agents."

By the British North America Act, this class of legislation was delegated to the separate provinces, and the Provincial Legislature of Ontario has enacted a similar measure (R. S. O. 1897, c. 150).

The province of Nova Scotia has dealt with the subject by the Factors Act (58 Vict. c. 11), and the amending Act (59 Vict. c. 23).

The province of Manitoba has dealt with the subject in 59 Vict. c. 25.

The Ontario Act (R. S. O. 1897, c. 150), is intituled an Act respecting contracts in relation to goods entrusted to agents.

By sect. 1 (1) it is enacted that "goods" shall include all personal property of whatever nature or kind soever;

(2) "Shipped" shall mean the carriage of goods, whether by land or by water;

(3) "Document of title" shall include every bill of lading, warehousekeeper's or wharfinger's receipt or order for delivery of goods, every bill of inspection of pot or pearl ashes, and every other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

2.—Any agent entrusted with the possession of goods, or of the documents of title thereto, shall be deemed the owner thereof for the following purposes, that is to say:

(1) To make a sale or contract as in s. 5 mentioned;

(2) To entitle the consignee of goods consigned by such agent to a lien thereon for any money or negotiable security advanced or given by him to or for the use of such agent, or received by the agent for the use of the consignee, in like manner as if such agent were the true owner of the goods;

amplification and not in derogation of the powers exerciseable by an agent independently of the Act. See s. 13.

From January 1st, 1890, the Factors Acts, 1823 to 1877 are repealed, but this repeal does not affect any right acquired or liability incurred before January 1st, 1890, under any enactment so repealed. See s. 14.

"The Act [The Factors Act, 1889 (52 & 53 Vict. c. 45)], which is a consolidation Act and also an amending Act, is separated into parts. Section 1 is preliminary. . . . From the 2nd section to the 7th inclusive the legislature has enacted what shall be the law in respect of 'Dispositions by Mercantile Agents.' From the 8th to the 10th, 'Dispositions by Sellers and Buyers of Goods,' and the 11th to the 17th are described as 'Supplementary' [*quære* Supplemental]. I cannot doubt that each of the sections included in this separate portion of the statute must be read as only applicable to the cases of persons indicated by that separate part of the statute" (*Inglis* v. *Robertson*, [1898] A. C. 616, at p. 624: Earl of *Halsbury* L.C.).

"The Act is divided into parts. The first, headed 'Preliminary,' consists of a definition clause. The last part, headed 'Supplemental,' contains provisions as to the mode of transfer 'for the purposes of this Act,' and certain savings. The other two parts

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(3) To give validity to any contract or agreement by way of pledge, lien or security, *bonâ fide* made with such agent, as well for an original loan, advance, or payment made upon the security of the goods or documents, as for any further or continuing advance in respect thereof; and

(4) To make such contract binding upon the owner of the goods and on all other persons interested therein, notwithstanding the person claiming such pledge or lien had notice that he was contracting only with an agent.

3.—Every agent in possession of goods or documents of title as aforesaid shall, for the purposes of this Act, be taken to have been entrusted therewith by the owner, unless the contrary is shown in evidence.

4.—Any agent entrusted as aforesaid and possessed of any documents of title, whether derived immediately from the owner of the goods or obtained by reason of the agent having been entrusted with the possession of the goods or of any document of title thereto, shall be deemed to be entrusted with the possession of the goods represented by such document of title.

5.—Any person may contract for the purchase of goods with any agent entrusted with the possession thereof, or to whom the same may be consigned, and may receive and pay for the same to such agent; and such contract and payment shall be binding upon the owner of the goods, notwithstanding the purchaser has notice that he is contracting only with an agent. The consideration necessary for the validity of a purchase under this section may be either a payment in cash or the delivery or transfer of other goods, or in part cash and in part the delivery or transfer of other goods.

are headed respectively 'Dispositions by Mercantile Agents,' and 'Dispositions by Buyers and Sellers of Goods.' These headings are not, in my opinion, merely marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them. It appears to me that the legislature has clearly indicated the intention that the provisions of s. 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents" (*ibid.* at p. 630: Lord *Herschell*).

By s. 15, the Act commenced and came into operation on the 1st day of January, 1890.

Sections 2 to 7 inclusive, deal with Dispositions by *Mercantile Agents.*

Sections 8 to 9 inclusive, deal with Dispositions by *Sellers and Buyers of Goods.*

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6.—In case any person has a valid lien and security on any goods or documents of title or negotiable security in respect of a previous advance upon a contract with an agent, and in case he delivers up the same to such agent upon a contract for the pledge, lien or security of other goods, or of another document or security by such agent delivered to him in exchange, to be held upon the same lien as the goods, documents or security so delivered up—then such new contract, if *bonâ fide*, shall be deemed a valid contract made in consideration of a present advance of money within this Act, but the lien acquired under such new contract on the goods, document or security deposited in exchange shall not exceed the value of the goods, document or security so delivered up and exchanged.

7.—All contracts pledging or giving a lien upon any such document of title, shall be deemed a pledge of and lien upon the goods to which it relates, and the agent shall be deemed the posessor of the goods or documents of title, whether the same are in his actual custody or are held by any other person for him or subject to his control.

8.—No antecedent debt owing from any agent entrusted as aforesaid, shall authorise any lien or pledge in respect of such debt, nor shall it authorise such agent to deviate from any express orders or authority received from his principal.

9.—Such contracts only shall be valid as are herein mentioned, and such loans, advances and exchanges only shall be valid as are made *bonâ fide*, and without notice that the agent making the same has no authority so to do, or that he is acting *malâ fide* against the owner of the goods.

10.—All *bonâ fide* loan, advances and exchanges as aforesaid, though made with notice of the agent not being the owner, but without notice of his acting without authority, shall bind the owner and all other persons interested in the goods, document or security, as the case may be.

Definitions.— "Mercantile Agent."

By s. 1 (1) the expression "mercantile agent" for the purposes of the Act means a mercantile agent having in the customary course of his business as such agent authority either

(*a*) to sell goods; or

(*b*) to consign goods for the purpose of sale; or

(*c*) to buy goods; or

(*d*) to raise money on the security of goods.

The adjective "mercantile" is often used in law in relation to trade or commerce, but for the purposes of the Factors Act, 1889, it is restricted to the special business of selling, consigning for sale, or buying goods or raising money on the security of goods.

In the Factors Acts, 1823 to 1877, the meaning of the phrases

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11.—Where any loan or advance is *bonâ fide* made to an agent entrusted with and in possession of goods or documents of title as aforesaid, on the faith of any contract in writing to consign, deposit, transfer, or deliver such goods or documents of title, and the same are actually received by the person making the loan or advance, either at the time of the contract or at a time subsequent thereto, without notice that the agent is not authorised to make the pledge or security, such loan or advance shall be deemed a loan or advance upon the security of the goods or documents of title within this Act.

12.—Every contract, whether made directly with the agent as aforesaid or with any clerk or other person on his behalf, shall be deemed a contract with such agent.

13.—Every payment, whether made by money, bills of exchange, or other negotiable security, shall be deemed an advance within this Act.

14.—Nothing herein contained shall lessen, alter or affect the civil responsibility of any agent for the breach of any duty or contract, or the non-fulfilment of his orders or authority, in respect of any such contract, agreement, lien or pledge as aforesaid.

15.—The conviction of any agent for theft, stealing, or other similar crime, shall not be received in evidence in any action against him.

16.—Nothing herein contained shall prevent the owner from redeeming any goods or documents of title pledged as aforesaid, at any time before the same have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which the lien exists, and upon payment or satisfaction to the agent of any sum of money for or in respect of which such agent is entitled to retain the goods or documents, by way of lien against such owner; or shall prevent the owner from recovering from the person with whom any goods or documents have been pledged, or who has any lien thereon, any balance or sum of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of the pledge or lien under the contract.

When the bailee has power to sell goods for repayment of advances without regard to any default in payment, in the ordinary course of trade he is a factor, not a pledgee (*Mitchell* v. *Sykes*, 4 O. R. 501).

"person intrusted with goods" and "agent intrusted with goods" was the subject of a good many decisions, as the following excerpts will show. These excerpts are also useful as instancing who are mercantile agents, and as showing that a mere servant, or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party, is not included in the term "mercantile agent," but that only persons whose employment corresponds to that of some kind of commercial agent like factors, commission merchants, consignees, etc., are included in that term.

1. "In *Wood* v. *Rowcliffe* (1846), 6 Hare, 183, *Wigram*, V.-C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner was not an agent within the meaning of the Act (5 & 6 Vict. c. 39), and consequently could not make a good pledge. In *Lamb* v. *Attenborough* (1862), 1 B. & S. 831, it was held that a clerk, who as such, was possessed of delivery orders, was not an agent intrusted within the meaning of the Act, and could not make a good pledge. In *Heyman* v. *Flewker* (1863), 13 C. B. (N.S.) 519, *Willes*, J., in delivering judgment, says that what the cases decide 'may be stated thus,—that the term "agent" does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the Act has taken its name.' So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent (*Jenkyns* v. *Usborne* (1844), 7 M. & G. 678; *M'Ewan* v. *Smith* (1849), 2 H. L. C. 309). And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant: yet it never seems to have occurred to anyone that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for, the trickster is not 'an agent intrusted' with the possession (*Kingsford* v. *Merry* (1856), 1 H. & N. 503; *Hardman* v. *Booth* (1863), 1 H. & C. 803).

"Quite consistently with these latter decisions it was held, first by

the Exchequer, on demurrer, in *Sheppard* v. *Union Bank of London* (1862), 7 H. & N. 661, and afterwards by the court of Queen's Bench, on the facts in *Baines* v. *Swainson* (1863), 4 B. & S. 270, that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

"In *Fuentes* v. *Montis* (1868), L. R. 3 C. P. 268, it was decided, first by the Common Pleas, and afterwards by the Exchequer Chamber, that, after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be 'intrusted,' and a pledge subsequently made by him was not good. In delivering judgment, *Willes*, J., speaks of *Baines* v. *Swainson*, *supra*, as going to the extreme of the law, but does not express dissent from it" (*Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at pp. 372, 373 : *Blackburn*, J.).

2. "The question is whether the transaction falls within the protection of 5 & 6 Vict. c. 39. On that there has been cited an authority : *Heyman* v. *Flewker* (1863), 13 C. B. (N.S.) 519. The head-note which expresses correctly the substance of the decision is as follows : 'Pictures were deposited by the defendant, with one I. (whose ordinary business was that of an agent for procuring business for two insurance offices in Liverpool), with instructions then or subsequently given to sell them for him for a certain commission. Held, that I. was an "agent intrusted with the possession of goods" within the meaning of the Factors Act (5 & 6 Vict. c. 39), and consequently that the defendant was bound by a contract of pledge *bonâ fide* made with him.' This was a decision of the Common Pleas in 1863. The judgment was delivered by *Willes*, J., than whom there is no higher authority upon such a question. I will read the concluding words of his judgment, as showing what the result of the judgment was. After referring to various decisions, he says (at p. 527), 'All that these cases decide applicable to the present purpose may be stated thus : that the term "agent" does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party ; but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name' " (*Tremoille* v. *Christie* (1893), 69 L. T. 338, at pp. 339, 340 : *Stirling*, J.). (16)

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(16) In an interpleader issue, the plaintiff claimed the goods in question (two horses) as purchaser, from one Irwin, who, he contended, was agent for C., the owner, within the statute (Consolidated Statutes of Canada, c. 59 (now

3. "A man (Brooke) was employed by the plaintiffs to take small articles of jewellery to private houses to sell. Instead of selling them for the benefit of his employers he pledged them for his own benefit, and then an action was brought to recover them from the pawnbroker with whom they were pledged . . . The Act [The Factors Act, 1889 (52 & 53 Vict. c. 45)] applies only to persons of the class ordinarily carrying on the business of mercantile agents, . . . it has no reference to a man in such a position as Brooke was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent" (*Hastings* v. *Pearson*, [1893] 1 Q. B. 62, at pp. 63, 64: *Mathew*, J.)

The actual words "agent intrusted with goods" do not now concern us, except in so far as they may be included in the expression "a mercantile agent in possession of goods with the consent of the owner."

"*Deemed to be in possession.*"

Section 1 (1) having given the meaning of "mercantile agent" for the purposes of the Act, sub-s. (2) of the same section, says that a person shall be *deemed to be in possession* of goods where the goods are in his actual custody or are held by any other person subject to his control or for him or on his behalf; and that a person shall be *deemed to be in possession* of the documents of title to goods where the documents are in his actual custody, or are held by any other person subject to his control, or for him or on his behalf. This constitutes what may be called a statutory

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incorporated in R. S. O. 1897, c. 150)). Irwin represented that the horses, with other goods, were sent to him by C. to sell, but that C. owing him money, he took them for himself on account of the debt:—*Held*, that Irwin was not such a general agent as is intended by the statute, and that if he were, his thus taking the goods for himself would not be a sale made valid by it. Section 5 of R. S. O. c. 150 and s. 1, c. 59, Consolidated Statutes of Canada, are as follows: "Any person may contract for the purchase of goods with an agent entrusted with the possession thereof, or to whom the same may be consigned, and may receive and pay for the same to such agent; and such contract and payment shall be binding upon the owner of the goods notwithstanding the purchaser has notice that he is contracting only with an agent." R. S. O., c. 150, is identical with Consolidated Statutes, 1859, c. 59. *Per* ROBINSON, C.J.: "Irwin was not the kind of general agent meant by the Act, c. 59, Consolidated Statutes, and, if he were, his taking the property, without the assent or knowledge of his absent principal, to pay a debt alleged to be due to himself, would not be a sale made valid by that statute" (*Hayes* v. *O'Connor*, U. C. Q. B. 21, 251).

possession of goods, and a statutory possession of the documents of title to goods.

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to" (*Ex parte Walton* (1881), 17 Ch. D. 746, at p. 756: *James*, L.J. (cited with approval by Earl *Cairns* in *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at pp. 455, 456)).

"I think the words here 'shall be deemed to have been surrendered' (and a similar observation of course applies to the other expression of the same kind 'shall be deemed to be determined') mean, shall be surrendered so far as is necessary to effectuate the purposes of the Act and no further" (*Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at p. 458: Lord *Blackburn*).

"*Goods.*"

The sale, consignment for sale, or purchase is to be of goods, and by s. 1 (3), the expression "goods" is to *include* wares and merchandise. We have already seen, *ante*, Chapter II.—Deposits. Section II. (*c*), p. 53, that the word "goods," is at common law synonymous with the word "chattels," that is, moveable goods or chattels, or chattels personal, or things personal. But it is to be borne in mind that, under the Factors Act, 1889, the goods must be such as the mercantile agent has, in the customary course of his business as such agent, *authority* to sell, consign for sale, buy, or raise money on.

In *Freeman* v. *Appleyard* (1862), 32 L. J. Ex. 175, the court (*Pollock*, C.B., *Bramwell*, and *Channell*, BB.) held that certificates of stock in the South Eastern Railway Company, were not goods within the meaning of 5 & 6 Vict. c. 39 (The Factors Act, 1842), and in *Williams* v. *Colonial Bank* (1888), 38 Ch. D. 388, *Lindley*, L.J., said, at p. 408, "I do not know that there is any decision to the effect that documents of this kind (blank transfers of shares in American Railroad), are goods and chattels within the Factors Act, and there is a decision to the contrary (*Freeman* v. *Appleyard* [(1862), 32 L. J. Ex. 175])."

"By s. 1 (3), 'the expression "goods" shall include wares and merchandise.' The word 'goods,' therefore, would seem to cover something more than wares and merchandise" (*Lee* v. *Butler*, [1893] 2 Q. B. 318, at p. 321: *Kay*, L.J.). In this case, the goods was applied to furniture, the possession of which was obtained under a hire and purchase agreement.

"*Document of Title.*"

Section 1 (4), enacts that for the purposes of the Act, the expression "document of title," shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

By s. 3 a pledge of the documents of title to goods shall "be deemed to be" (see *ante*, p. 186, as to the meaning of "deemed to be") a pledge of the goods. See *ante*, p. 137.

The statutory fiction as to possession (s. 1, (2)), and the statutory fiction as to a pledge of the documents of title to goods being a pledge of the goods together constitute a statutory pledge.

The word "pledge," however, by the Act receives a statutory extension of meaning as we shall now see.

"*Pledge.*"

For the purposes of the Act the expression "pledge" shall include any contract pledging or *giving a lien* or security on goods (see s. 1 (5). This is giving a new signification to the well-known legal term "pledge," making it embrace a *contract giving a lien* on goods. We have seen (*ante*, Section I. (*a*), p. 132), that a common law pledge and a common law lien are distinct in their natures; a common law pledge being a *delivery* of goods to a creditor giving him a *special property* in them, and a power of sale on default of payment: whereas a common law lien gives the creditor a right to *retain* the goods until his debt is paid, and vests no special property in them in him, and gives him no power of sale on default of payment. It is also true that a common law lien is not *given by a contract*, it is a right accompanying a contract. The Act can, it would seem, only apply to an *express contract giving a lien*, and not to a common law lien.

As authority for the above I quote the following passages:

"Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien, and limits their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.* If a consignee takes an express security it excludes general lien" (*In re Leith's*

Estate (1866), L. R. 1 P. C. 296, at p. 305: Lord *Westbury* delivering the judgment of the judicial committee).

"His Lordship [Lord *Eldon*] afterwards delivered a more considered judgment [in the case of *Cowell* v. *Simpson* (1809), 16 Ves. 275], in which he said, 'Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decisions been extended, it may be described as *primâ facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades the demand being for work and labour; applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other.' And he added later in his judgment, 'My opinion, therefore, is that where these special agreements are taken, the lien does not remain; and whether the securities are due or not, makes no difference.' But in that case the special security taken was for three years, and was in its nature such as to be entirely inconsistent with the retention of the lien, and that was the reason why Lord *Eldon* held the lien to have been lost. It is true that in another case (*Balch* v. *Symes* (1823), T. & R. 87 at p. 92), Lord *Eldon* states the doctrine in rather more general terms, and says, 'Notwithstanding the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell* v. *Simpson* (1809), 16 Ves. 275, I still entertain the opinion that an attorney who takes a security abandons his lien. That doctrine, however, will not apply to sums which are not covered by the security; and as to those sums, therefore, the lien must be considered to remain.' But I do not understand him to have meant that every security will destroy a lien; and my view on this is strengthened by *Hewison* v. *Guthrie* (1836), 2 Bing. N. C. 755, where (at p. 759) Chief Justice *Tindal* says, 'It is well established that if a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone.' As I understand the law it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it" (*Angus* v. *McLachlan* (1883), 23 Ch. D. 330, at pp. 334, 335, 336: *Kay*, J.).

Consideration.

By s. 1 (5), the consideration for the pledge may be that "of an original advance or of any further or continuing advance or of any pecuniary liability."

It the goods are pledged to A. for a part only of their value, it would seem that they could then be pledged to B. for the remainder of their value. For if a person pledges goods to A. for a debt which does not exhaust the whole value of the goods, they are in his control, being in the possession of A. subject to the pledgor's control and on his behalf, to the extent to which the goods are not exhausted by the previous pledge (see *Portalis* v. *Tetley* (1867), L. R. 5 Eq. 140).

"*Person.*"

By s. 1 (6), the expression "person" includes any body of persons corporate or unincorporate.

Pledges by Mercantile Agents.

Mercantile agent in possession with consent of owner.—By s. 2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any pledge of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of the Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the pledge acts in good faith, and has not at the time of the pledge notice that the person making the pledge has not authority to make the same.

It would seem to be immaterial that the consent of the owner was obtained by the fraud of the mercantile agent (*Sheppard* v. *Union Bank of London* (1862), 7 H. & N. 661; *Baines* v. *Swainson* (1863), 4 B. & S. 270; and *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354, at p. 373: *Blackburn*, J.). See *ante*, p. 185.

For the meanings of "mercantile agent," "in possession," "goods," "document of title," and "pledge," see *supra*.

Mercantile agent in possession after determination of owner's consent.—By s. 2.—(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any pledge, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking

under the pledge has not at the time thereof notice that the consent has been determined. See note to sub-s. (1), *supra*.

Mercantile agent in possession of documents of title relating to such goods deemed to be with consent of owner.—By s. 2.—(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Pledge for Antecedent Debt or Liability.

By s. 4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

A possible indebtedness or liability in the future cannot be treated as a debt or liability due before the time of the pledge (see *Kaltenbach* v. *Lewis* (1885), 10 App. Cas. 617; *Macnee* v. *Gorst* (1867), L. R. 4 Eq. 315; and *Jewan* v. *Whitworth* (1866), L. R. 2 Eq. 692).

Consideration for Pledge.

By s. 5. The consideration necessary for the validity of a pledge in pursuance of the Act may be either:

A payment in cash, or

The delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or

Any other valuable consideration.

No Interest Acquired in Excess of Value of Goods, etc., Exchanged.

By s. 5. Where the goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess

of the value of the goods, documents, or security when so delivered or transferred in exchange.

What deemed an Agreement with Agent.

By s. 6. For the purposes of the Act, an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of pledge on his behalf, shall be deemed to be an agreement with the agent.

Pledges by Sellers and Buyers of Goods.

Pledge by seller.—By s. 8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any pledge or under any agreement for pledge thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. (See reproduction of this section by s. 25 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).)

Pledge by buyer.—By s. 9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any pledge, or under any agreement for pledge thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (See reproduction of this section by s. 25 (2) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).)

It would seem that the purchase of goods in s. 9 of the Factors Act, 1889, means a purchase in fact. The evidence of such purchase need not be in writing. It cannot be intended that the pledgee of the purchaser should be bound to inquire whether the purchase is recorded in writing, or to see whether the Statute of Frauds or the Sale of Goods Act, 1893, has been complied with. The object of the Act is to give effect to pledges to *bonâ fide* pledgees without notice. The next two extracts are from a case decided on s. 4 of the Factors Act, 1877, where the words were "sold or contracted to be sold," and the words in s. 9 of the Factors Act, 1889, are "bought or agreed to buy."

"*Contracted to be Sold.*"

"I think those words ['where any goods have been sold or contracted to be sold and the vendee, or any person on his behalf, obtains the possession of the documents of title'] mean only that there must have been a contract of sale in fact and a vendee in fact to whom under the contract the property passes, or to whom it is intended that the property in the goods shall eventually pass. The legislature have not said that the contract must be in writing. It is to be observed that the section is not dealing with the rights of the parties to that contract as against each other, but with the rights of third persons who enter into another transaction on the faith of the possession which the vendee under that contract has obtained of the documents of title. The case contemplated appears to me to be that in which there has been in fact a contract for the sale of goods, and the purchaser has obtained from the vendor possession of the documents of title to such goods in which case the rights of third persons who have dealt on the faith of such possession are made to depend on the sight of the documents in the hands of the person to whom the vendor has in fact contracted to sell, and to whom he has given possession of the documents. To construe the section as importing the necessity for a contract in writing which would satisfy the Statute of Frauds, would be, I think, to do away with the mercantile effect of it, and to take away the protection which it was intended to afford, to a very great extent. It never can have been intended that a person purchasing on the faith of documents of title in the hands of a vendee should be bound to inquire whether the contract for sale was in writing, or to examine the contract if in writing to see whether it complies with all the requirements held necessary under the Statute of Frauds" (*Hugill* v. *Masker* (1889), 22 Q. B. D. 364, at pp. 370, 371: Lord *Esher*, M.R.).

"What is the object of that section? It is to give effect to transfers to *bonâ fide* purchasers without notice by persons in possession of certain documents of title with regard to goods as vendees of such goods, and to prevent the mischief which happens where persons dealing with the possessors of such documents find that after all the possession of the documents on which they relied may be invalidated as between the parties to the original contract of sale by reason of some fraud. The intention is to enable intending purchasers to deal freely and boldly with persons claiming to be vendees of goods who are in possession of the documents of title to the goods. The mischief aimed at would not be effectively cured, nor would the intention that purchasers should be able to deal freely and boldly with persons in possession of the

documents of title be satisfactorily carried out, if such purchasers could be defeated by showing that, though there was in fact an original contract of sale under which the persons with whom they dealt might well be lawfully in possession of the documents of title, such contract was not valid, because it was not in writing. In my opinion, the section, when it speaks of 'goods sold or contracted to be sold,' and the 'vendee' of such goods, does not mean to imply as a condition of its applicability that there should be such a contract for sale in writing as would satisfy the Statute of Frauds, or that the vendee must be vendee under such a contract. It is dealing with the mercantile rights of the parties as resulting from the original contract apart from any question of proof or procedure in an action on the contract" (*Hugill* v. *Masker* (1889), 22 Q.B.D. 364, at pp. 371, 372 : *Bowen*, L.J.).

The succeeding cases are decided on s. 9 of the Factors Act, 1889.

"*Agreed to buy.*"

1. By an agreement for the hire and purchase of furniture, the hirer agreed to pay, by way of rent for the hire and use of the furniture, the sum of 1*l.* on May 6th, and the further sum of 96*l.* 4*s.* on August 1st, 1892 ; and the last clause provided in effect that the goods should become the sole and absolute property of the hirer when the two sums, amounting to 97*l.* 4*s.*, had been paid :—*Held*, to be an agreement for *purchase* and clearly within s. 9 of the Factors Act, 1889 (*Lee* v. *Butler*, [1893] 2 Q. B. 318 : Lord *Esher*, M.R., *Bowen* and *Kay*, L.JJ.).

2. "An agreement to buy imports a legal obligation to buy" (*Helby* v. *Matthews*, [1895] A. C. 471, at p. 475 : Lord *Herschell*, L.C.).

3. A person was to obtain possession of a piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10*s.* 6*d.* a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any other payment beyond the monthly sum then due :—*Held* not to be a purchase or a binding agreement to buy, but an option to buy, and that the person having the option to buy did not convert himself into a purchaser by pledging the piano (*Helby* v. *Matthews*, [1895] A. C. 471 ; Lord *Herschell*, L.C., Lords *Watson*, *Macnaghten*, *Morris* and *Shand*). (15)

Canadian Cases.

(15) For cases of this character, see *Williams* v. *Grey*, 23 U. C. C. P. 561 ; *Morton* v. *Stone*, 30 O. Q. B. 158; *Walker* v. *Hyman*, 1 A. R. (U. C.) 345 ; *Mason* v. *Buckle*, 2 O. A. R. 291 : *Nordheimer* v. *Robinson*, 2 O. A. R. 305,

4. "The agreement in question is ill-expressed, but it appears to us to contain an irrevocable promise by the hirer to pay 4*l.* a month until the full price of 15*l.* 5*s.* is paid, and when the 15*l.* 5*s.* has been paid the rope thereupon becomes the property of the hirer. Various contingencies are named in which the owner may put an end to the arrangement for sale, but there is nothing corresponding to the provision on which the decision of the House of Lords, in *Helby* v. *Matthews*, [1895] A. C. 471, appears to have turned. There 'the *hirer* may terminate the hiring by delivering up to the owner of the said instrument.' We therefore think that in the present case the hirer had agreed to buy the rope within the meaning of the Factors Act, 1889" (*Hull Ropes Co.* v. *Adams* (1895), 65 L. J. Q. B. 114, at p. 117: *Grantham*, J., delivering the written judgment of the court (*Grantham*, J. and *Wright*, J.)).

By s. 11. For the purposes of this Act the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

By s. 12 (2), Nothing in the Act shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

SECTION XIV.

PAWNBROKERS AND THE PAWNBROKERS ACT, 1872.

In this section only those parts of the Pawnbrokers Act, 1872, are referred to that concern us in viewing the business of a pawnbroker as a branch of pledging.

PAWNBROKERS ACT, 1872.

(35 & 36 Vict. c. 93.)

By s. 5 "pawnbroker" includes every person who carries on the business of taking goods and chattels in pawn.

It is to be noted that the word "includes" is used so that a person who does not carry on the *business* of taking goods and chattels in pawn may, as we have seen (*ante*, p. 132), be a pawnbroker. The word "means" is also used in this section. It will

be as well to note the distinction between these two words "includes" and "means," and for this purpose the judicial opinions following will be useful. (16)

"The words, however (as was pointed out by the learned judge [Sir *Robert Phillimore*]), are not 'shall mean,' but 'shall include.' In some of the clauses in the same part of the Act [Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90)] the other words 'shall mean' are used, and in the other clauses in which the words 'shall include' are used, the most absurd consequences would follow if the words 'shall include' were construed as equivalent to 'shall mean'" (*Dyke* v. *Elliott* (1872), L. R. 4 P. C. 184, at p. 192: *James*, L.J.).

"The words 'shall include' are not identical with, or put for, 'shall mean.' The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the Act [the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99)] would otherwise have, it merely provides that certain specified cases shall be included" (*R.* v. *Hermann* (1879), 4 Q. B. D. 284, at p. 288: Lord *Coleridge*, C.J.).

"The interpretation clauses referred to during the argument provide that 'the word "street" shall extend to and include any road.' The intention of the clauses is that in construing the Acts the word, in addition to its ordinary meaning, shall bear the meanings mentioned in the section: the words 'shall include,' mean 'shall have the following meanings in addition to its popular meaning'" (*Corporation of Portsmouth* v. *Smith* (1883), 13 Q. B. D. 184, at p. 195: *Brett*, M.R.).

Reasons for the Passing of the Pawnbrokers Act, 1872.

"It is a very common occurrence for a pawner to dispose by sale or gift of his pawn-ticket to another person, with the intention to confer upon the vendee or donee a right to redeem the article pledged; and by the accidents of life it constantly happens that the pawner loses or accidentally destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed, and who actually

Canadian Cases.

(16) Section 1, Pawnbrokers Act, R. S. O., c. 188, provides that "every person who takes or receives by way of pawn, pledge or exchange, any goods for the repayment of money lent thereon shall be deemed a pawnbroker within the meaning of the Act."

delivers the article to the pawnbroker, is in law the pawner, and in his name the ticket is made out, and it not rarely happens that this ticket is retained by the pawner and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things) that the Pawnbrokers Act, 1872 (in substitution of the Acts which previously existed upon the subject) was passed—partly for the protection of pawnbrokers, partly also for the protection of pawners and owners of property pledged" (*Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, at p. 43: *Hawkins*, J., delivering the judgment of the court (*Huddleston*, B., and *Hawkins*, J.)).

Non-application of Pawnbrokers Act, 1872, to Loans above 10l.

Nothing in the Pawnbrokers Act, 1872, applies to a loan by a pawnbroker of above ten pounds, or to the pledge on which the loan is made, or to the pawnbroker or pawner in relation to the loan or pledge; and notwithstanding anything in the Act, a person shall not be deemed a pawnbroker by reason only of his paying, advancing, or lending on any terms any sum or sums of above ten pounds (see s. 10).

Pawn-ticket.

A pawnbroker shall on taking a pledge in pawn give to the pawner a pawn-ticket, and shall not take a pledge in pawn unless the pawner takes a pawn-ticket (s. 14).

Redemption of Pledge.

Every pledge shall be redeemable within twelve months from the day of pawning, exclusive of that day; and there shall be added to that year of redemption seven days of grace, within which every pledge (if not redeemed within the year of redemption) shall continue to be redeemable (s. 16).

Pledge pawned for 10s. or under not Redeemable after the Year and Days of Grace.

A pledge pawned for ten shillings or under, if not redeemed within the year of redemption and days of grace, shall at the end of the days of grace become and be the pawnbroker's absolute property (s. 17). See remarks on this section by *Hawkins*, J., *post*, p. 200.

Pledge Pawned for above 10*s. Redeemable till Sale by Public Auction.*

A pledge pawned for above ten shillings shall further continue redeemable until it is disposed of, as in this Act provided, although the year of redemption and days of grace are expired (s. 18).

A pledge pawned for above ten shillings shall, when disposed of by the pawnbroker, be disposed of by sale by public auction, and not otherwise (s. 19).

A pawnbroker may bid for and purchase at a sale by auction, made or purporting to be made under this Act, a pledge pawned with him; and on such purchase he shall be deemed the absolute owner of the pledge purchased (*ibid.*).

Surplus on Sale to be Accounted for within Three Years.

Where a pledge pawned for above ten shillings is sold, and appears from the pawnbroker's book to have been sold for more than the amount of the loan and profit due at the time of sale, the pawnbroker shall, on demand, pay the surplus to the holder of the pawn-ticket in case the demand is made within three years after the sale, the necessary costs and charges of the sale being first deducted (s. 22).

Balance of Deficit and Surplus on Sale of Pledges.

If on any such demand it appears from the pawnbroker's book that the sale of a pledge or pledges has resulted in a surplus, and that within twelve months before or after that sale the sale of another pledge or other pledges of the same person has resulted in a deficit, the pawnbroker may set off the deficit against the surplus, and shall be liable to pay the balance only after such set-off (*ibid.*).

Special Contract.

Nothwithstanding anything in this Act, a pawnbroker may make a special contract with a pawner in respect of a pledge on which a pawnbroker makes a loan of above forty shillings (s. 24).

This special contract is to be read with reference to the Act, but where there is in it nothing to exclude the common law rights of a pawnbroker, the pawnbroker may avail himself of such rights.

"I think it is clear that under the contract, read without reference to the Act, the pawnbroker would have a right to recover the balance of the loan unsatisfied on the sale of the pledge. It is a contract of pledge, and if the article pawned does not realise the amount lent on it, he may bring an action for the deficit. But I agree that the contract is to be read with reference to the Act. Does that Act make a difference? I think not. There is nothing which excludes the common law right of the pawnbroker to recover whatever sum he may have advanced beyond the value of the pledge" (*Jones* v. *Marshall* (1889), 24 Q. B. D. 269, at p. 271: Lord *Coleridge*, C.J.).

"I am of the same opinion. Section 22 seems to show conclusively the intention of the legislature, because it contemplates the right of the pawnbroker to be paid for any deficit, and indicates a fund out of which he may be paid, viz., a surplus arising from any other pledge. There is nothing to prevent him from resorting to the ordinary right at common law in the event of his debt being unsatisfied" (*ibid.*, *Matthew*, J.).

See *ante*, p. 164, (d) Pledgee's Action for the Debt or Deficit after Sale at Common Law.

Delivery up of Pledge.

The holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn-ticket, and he is hereby indemnified for so doing (s. 25).

A pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn-ticket for it is delivered to him (s. 26).

These two sections apply only as between pawner and pawnbroker, but do not affect an owner whose property has been pledged against his will, or whose claim rests on a title paramount.

Sections 25 and 26 of the Pawnbrokers Act, 1872, do not affect the common law rights of the owner of property which is pledged against his will.

"It is clear to our minds that in these two sections (35 & 36 Vict. c. 93, ss. 25, 26) the legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and as between the pawner and the pawnbroker to compel

the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled, and to presume him to be the lawful holder of it without further investigation of his title; and should it so happen that the ticket is presented and the pledge redeemed by a person who has in fact no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawner, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge. This construction seems to us to give full effect to, and to be the true interpretation of the 25th section. In our judgment that section in no degree affects an owner whose property has been pledged against his will. He is in no sense a person entitled to redeem the pledge, or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. The 25th section does not say that the holder of the ticket shall be presumed to be the owner, but that he shall be presumed to be the person entitled to redeem, or in other words, the person entitled to represent the pawner whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will.

"To our mind, it is very clear that the legislature did not in the sections relating to the redemption of pledges intend prejudicially to affect the rights of such owners as we have last referred to, otherwise a valuable jewel pledged for a sum of 5*s.* or 10*s.* by a fraudulent person without title would, if unredeemed within a year, become under s. 17 the pawnbroker's absolute property. A state of things too monstrous to bear a moment's serious consideration" (*Singer Manufacturing Co.* v. *Clark* (1879), 5 Ex. D. 37, at pp. 44, 45: *Hawkins*, J., delivering the judgment of the court (*Huddleston*, B., and *Hawkins*, J.)).

Pledge Destroyed or Damaged by Fire.

Where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable, on application within the period during which the pledge would have been redeemable, to pay the value of the pledge, after deducting the amount of the loan and profit, such value to be the amount of the loan and profit and twenty-five per cent. on the amount of the loan (s. 27).

A pawnbroker shall be entitled to insure to the extent of the value so estimated (*id.*).

This section clearly applies, whether the fire is accidental or occasioned by the default, neglect, or wilful misbehaviour of the pawnbroker or his servants.

Compensation for Depreciation of Pledge.

If a person entitled and offering to redeem a pledge shows to the satisfaction of a court of summary jurisdiction that the pledge has become or has been rendered of less value than it was at the time of the pawning thereof by or through the default, neglect, or wilful misbehaviour of the pawnbroker, the court may, if it thinks fit, award a reasonable satisfaction to the owner of the pledge in respect of the damage, and the amount awarded shall be deducted from the amount payable to the pawnbroker, or shall be paid by the pawnbroker (as the case requires) in such manner as the court directs (s. 28).

Pawnbroker's Interest may be taken on Execution.

"The sheriff, having seized, had taken possession, amongst other things, of a number of goods in pledge: in which, therefore, the pawnbroker had a qualified property. As to some of the pledges, more than twelve months and a week had expired and some of the goods were irredeemable. As to others less than twelve months had expired. It is conceded that the sheriff could not be compelled to go out of possession of those articles which had been pledged for more than twelve months. It is admitted that he is entitled to remain in possession of the other goods also unless the appointment of the receiver has intercepted his rights. It is not disputed that if they remain in his possession until the time for redemption expires, the sheriff will have an interest in the property. It is clear to me that the sheriff has in the meantime also an interest in the goods; which are held as security for the money advanced on them, and to secure which the goods were pledged. When I say it is a security I do not think it is within 1 & 2 Vict. c. 110 (the Judgments Act, 1838), s. 12, which, I think, means only securities *ejusdem generis*, as the securities particularly mentioned in the section. And I doubt whether the section can be held to apply to goods in pledge. But independently of that, the sheriff has a right to the possession of the goods in respect of the qualified property the pawnbroker has in them: and he has a right to sell them when the twelve months and a week shall have expired, and to make a good title to any one to whom he sells, and has a right

to receive the money; and in respect of the redeemable pledges it appears to me the appointment of the receiver has not intercepted his right; and the sheriff has a right to hold the goods by way of deposit, and they cannot be redeemed except by payment of the money secured by the pawners, and the person for whom the sheriff holds the goods is entitled to any money paid for redemption" (*In re Rollason* (1887), 34 Ch. D. 495, at p. 497: *North*, J.).

CHAPTER VI.

HIRE.

SECTION I.—*Definition*, p. 203.

SECTION II.—*Hire Classified and Distinguished*, p. 204.

SECTION III.—*The Contract of Hire*, p. 204.

(*a*) *Parties*, p. 204.

(*b*) *Subject-matter of Hire*, p. 204.

(*c*) *Reward for Hire*, p. 204.

We have now arrived at the second branch of Part III., and the last and largest class of bailments,—that of *Hire*. This class embraces an extensive variety of every-day contracts, *e.g.*, the hire of goods and chattels, work and services, of custody. It concerns also such trades and businesses as that of agisters, warehousemen, wharfingers, innkeepers, carriers of goods and passengers by land and by water. This branch may conveniently be treated of in the following order :—

1. Hire of goods and chattels : see Chapter VII. ;
2. Hire of work, labour, and services : see Chapter VIII. ;
3. Hire of custody : see Chapter IX. ;
4. Innkeepers : see Chapter X. ; and
5. Carriers : see Chapter XI.

SECTION I.

DEFINITION.

Hire "is a contract whereby the use of a thing, or the services and labour of a person, are stipulated to be given for a certain reward" (Story, s. 368).

"At the common law it may properly enough be defined to be a bailment of a personal chattel, where a compensation is to be given for the use of the thing, or for labour or services about it ; or, in other words, it is a loan for hire, or a hiring or letting of goods, or of labour and services, for a reward" (Story, s. 368).

SECTION II.

HIRE CLASSIFIED AND DISTINGUISHED.

The contract of *locatum*, or *hiring*, always for reward, may be divided into the three following classes :—

(1.) *Locatio rei*, by which the hirer gains the temporary use of *the thing* (Jones, p. 36).

This class will be treated of in Chapter VII.

(2.) *Locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered (Jones, p. 36).

This class will be treated of in Chapters VIII. and IX.

(3.) *Locatio operis mercium vehendarum* when goods are bailed, for the purpose of being *carried* from place to place, either to a *public* carrier, or to a *private* person (Jones, p. 36).

This class will be treated of in Chapter XI.

SECTION III.

THE CONTRACT OF HIRE.

(a) Parties.

The capacity to be parties to a contract of hire is regulated by the general law concerning capacity to contract (see *ante*, p. 10, Chapter I., Section II. (h)).

(b) Subject-matter of Hire.

Goods and chattels, that is to say, personal or moveable property, are to be one of the subject-matters ; work, labour, care, pains or carriage the others.

(c) Reward for Hire.

The price or recompense is either fixed, certain and determinate, or capable of certainty and estimation. If none is fixed, then a fair and reasonable price or recompense is generally implied, such, for instance, as is usual or customary in the trade or business or previous dealings of the parties, or such sum as the jury should think fair and reasonable.

CHAPTER VII.

HIRE OF GOODS AND CHATTELS.

SECTION I.—*Definitions*, p. 205.

SECTION II.—*Illegal and Immoral Purposes*, p. 206.

SECTION III.—*Letter's Duty and Responsibility and Right of Action*—

(*a*) *Letter's Warrant of Fitness of Thing Let*, p. 208.
(*b*) *Letter's Control and Management of Thing Let*, p. 210.
(*c*) *Cab Drivers and Cab Proprietors*, p. 215.
(*d*) *Letter's Right of Action for Injury to the Things Hired*, p. 217.

SECTION IV.—*Hirer's Duty and Responsibility*—

(*a*) *Hirer's Negligence*, p. 218.
(*b*) *Hirer's Servant's Negligence*, p. 221.
(*c*) *Expenses*, p. 225.

SECTION V.—*Redelivery*, p. 226.

SECTION VI.—*Hirer's Possessory Interest and Right of Action*, p. 227.

SECTION VII.—*Determination of Hire caused by the Letter's or Hirer's Conduct*, p. 228.

SECTION VIII.—*Execution*, p. 231.

The last chapter dealt with the contract of Hire generally. In this chapter the first class of hire, viz., Hire of Goods and Chattels, will be dealt with.

SECTION I.

DEFINITIONS.

"When goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*" (*Coggs* v. *Bernard* (1704), Ld. Raym. 909, at p. 913: *Holt*, C.J.).

"*Locatio rei*, by which the hirer gains the temporary use of *the thing*" (Jones, p. 36).

"*Locatio*, or *locatio-conductio*, *rei*, is a contract by which the hirer gains a transient qualified property in the *thing* hired, and the owner acquires an absolute property in the stipend, or price of the hiring" (Jones, p. 85).

SECTION II.

ILLEGAL AND IMMORAL PURPOSES. (1)

The hire of goods and chattels must not be for an illegal or immoral purpose. If it is, it conveys no rights in any court to a party who is himself implicated in the illegality or immorality. The person against whom it is sought to enforce such a contract may show the illegality or immorality of its purpose. *Ex turpi causâ non oritur actio* and *ex dolo malo non oritur actio* are the well-known legal maxims applicable to such a hiring. It is not necessary that the illegality or immorality should be an indictable offence. That it is against public policy, or *contra bonos mores*, is sufficient. I need do no more than give the following citations in support of what I have stated :

1. "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed ; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this ; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes ; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it ; for where both are *equally* in fault, *potior est conditio defendentis*" (*Holman* v. *Johnson* (1775), Cowp. 341, at p. 343 : Lord *Mansfield*).

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(1) *Immoral contracts.*—The rule of law which holds contracts made upon immoral consideration to be invalid is confined to executory agreements (*Hagar* v. *O'Neil*, 20 O. A. R. 198).

A contract for transfer of property with intent by the transferor, and for the purpose that it shall be applied by the transferee to the accomplishment of an illegal and immoral purpose, is void, and cannot be enforced ; but mere knowledge of the transferor of the intention of the transferee so to apply it, will not avoid the contract, unless from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended.

2. "Since the case of *Cannan* v. *Bryce* (1819), 3 B. & Ald.179, cited by Lord *Abinger* in delivering the judgment of this court in the case of *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434, at p. 441, and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other. The rule of law was well settled in *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179; that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir *Charles Abbott*), who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically *his* judgment; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore this article [a brougham] was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain" (*Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213, at pp. 217, 218: *Pollock*, C.B.).

3. "*Ex turpi causâ non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

If authority is wanted for this proposition, it will be found in the well-known judgment of Lord *Mansfield* in *Holman* v. *Johnson* (1775), Cowp. 341, at p. 343" (*Scott* v. *Brown & Co.*, [1892] 2 Q. B. 724, at p. 728: *Lindley*, L.J.).

SECTION III.

LETTER'S DUTY, RESPONSIBILITY, AND RIGHT OF ACTION.

(a) Letter's Warrant of Fitness of Thing Let.

The party letting the goods and chattels is bound to furnish those which are reasonably fit and proper to be used for the purpose intended; in fact he warrants that they shall be so, though he does not insure against all defects, but only against such defects, even though latent, as reasonable care and skill can guard against. The letter is responsible in damages arising from the things let not being reasonably fit and proper for the purpose intended. (2) This is clear from the subjoined authorities:

1. "If a carriage be let for hire, and it breaks down on the journey, the letter of it is liable, and not the party who hires it. So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods—such as are fit to be used for the purpose intended? Undoubtedly the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such, that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation. It

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(2) Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer:—*Held*, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendan. could not recover. *Per Armour*, J.: "The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use; that is, which the generality of men use in keeping their own goods of the same kind. The lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, and in the absence of negligence on the part of the defendants lessor cannot recover" (*Reynolds* v. *Roxburgh et al.*, 10 O. R. 649).

is manifest from cases of every day occurrence, that such is the law" (*Sutton* v. *Temple* (1843), 12 M. & W. 52, at pp. 60, 61: Lord *Abinger*, C.B.).

2. "I take it that the rule of law is this:—If a horse or carriage be let out for hire, for the purpose of performing a particular journey, the party letting warrants that the horse or carriage, as it may be, is fit and proper and competent for such journey. In the case of a horse, as here, if the animal falls lame on the journey, I am clearly of opinion that the hirer may abandon him at any place where he turns out unfit, and give notice of that fact to the party letting him out, whose duty it is to send for him" (*Chew* v. *Jones* (1848), 10 L. T. (o.s.) 231: *Pollock*, C.B.).

3. "The first question is, whether a person letting carriages for hire enters into an implied contract that the carriage so let to hire is fit for the purpose for which it is hired. Every one who lets out a carriage to hire for a specific purpose does, by so doing, warrant that it shall be reasonably fit for that purpose" (*Jones* v. *Page* (1867), 15 L. T. (N.S.) 619, at p. 620: *Kelly*, C.B.).

4. "A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the break down was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs* (1809), 2 Camp. 80, and as the railway company did in *Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412, he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses . . .

"In many of the cases bearing on this subject, the expression 'reasonably fit and proper' is used. This is a little ambiguous, and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, *i.e.*, as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and *vice versâ*. The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great" (*Hyman* v. *Nye* (1881), 6 Q. B. D. 685, at pp. 687, 688: *Lindley*, J.). See remarks on the above by *Wright*, J., in *Vogan and Co.* v. *Oulton*, (1899), 79 L. T. 384, at p. 385.

(b) Letter's Control and Management of Thing Let.

If the thing let continue under the control and management of the letter, he would be liable for any accidents produced by the negligence of himself or his servants. The following cases both illustrate and confirm the above rule, as well as deal fully with the principle *qui facit per alium facit per se*, which is applicable to the case of hiring goods and chattels. The cases of *Dean* v. *Branthwaite* (1803), 5 Esp. 35, and *Sammell* v. *Wright* (1805), 5 Esp. 262, both presided over by Lord *Ellenborough*, are illustrations of the above rule. (3)

Hired Horses and Driver—Negligence of Driver.

1. The defendant being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had he any previous knowledge of him. The driver had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove; the defendant gave him five shillings as a gratuity for his day's work, but the driver had no power to demand anything. In the course of driving the carriage, the coachman by his negligent conduct occasioned the injury complained of by the plaintiff.

"In the case now before the court, the hirer makes no contract with the coachman: he does not select him; he has no privity

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(3) *Thompson* v. *Fowler*, 23 O. R. 644, *post*, p. 215.

with him; he usually gives him a gratuity, but he is not by law obliged to give him anything; and from thence I conclude that the coachman is not the servant of the hirer. And if the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, he may, at any moment, require him to quit the charge of the horses, and deliver them over to another, and must be obeyed; but I think it cannot be said that the coachman may not lawfully refuse, and ought not in most cases to do so. It does not seem to be doubted that the injured party may sue the owner of the horses; is there, then, any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance, he must certainly have his remedy over against the letter, so that the letter will in the end be answerable, and there will be circuity of action, which is inconvenient, and to be avoided if possible" (*Laugher* v. *Pointer* (1826), 5 B. & C. 547, at pp. 579, 580: *Abbott*, C.J.).

Hired Horses and Postillions.

2. The defendant was a livery stable-keeper, and on the day when the accident in question occurred, had let out to a Mr. ——— four post-horses, which he sent to his house with two of his postillions. The horses were hired for the day, for the purpose of drawing Mr. ———'s carriage to Epsom races and back, which they did, being driven and managed entirely by the defendant's servants, who drove against the plaintiff's gig, and occasioned the damage complained of.

"Adhering to the opinion which I, upon deliberation, formed in the case of *Laugher* v. *Pointer* (1826), 5 B. & C. 547, from which I do not consider this case, in substance, distinguishable, I think the present defendant, as the owner of the horses, is liable" (*Smith* v. *Lawrence* (1828), 2 Man. & Ryl. 1, at p. 2: Lord *Tenterden*, C.J.).

The Rule of Law Considered and Settled.

3. "We are, therefore, compelled to decide upon the question left unsettled by the case of *Laugher* v. *Pointer* (1826), 5 B. & C. 547, in which the able judgments on both sides have, as is observed by

Mr. Justice *Story* in his book on Agency, p. 406 'exhausted the whole learning of the subject, and should on that account attentively be studied.' We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale.

"The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether anyone but the coachman is liable to the party injured; for the coachman certainly is.

"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference.

"But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice *Eyre* says in the case of *Bush* v. *Steinman* (1799), 1 Bos. & P. 404, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord *Tenterden* observes, 'shock the common sense of all men': not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness whilst passing along the street. It is true that there are [illegible]s—for instance that of

Bush v. *Steinman* (1799), 1 Bos. & P. 404 ; *Sly* v. *Edgley* (1806), 6 Esp. 6 and others, and perhaps amongst them may be classed the recent case of *Randelson* v. *Murray* (1838), 3 Nev. & Per. 239—in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my Brother Littledale, in his very able judgment in *Laugher* v. *Pointer* (1826), 5 B. & C. 547.

"The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or managed, that other persons are not injured ; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances : but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them" (*Quarman* v. *Burnett* (1840), 6 M. & W. 499, at pp. 509, 510, 511 : *Parke*, B., delivering the judgment of the court). See *Jones* v. *Scullard*, [1898] 2 Q. B. 565, at pp. 574, 575, where Lord *Russell*, C.J., states the principle to be extracted from the cases.

Hire of Steam Tug and Crew—Negligence of Crew.

4. Hetherington, the lessee and occupier of a steam ferry plying between Liverpool and Rock Ferry, had, on the day in question, hired from the defendants, who represented the Liverpool Steam Tug Company, one of their steam tugs, for the day only, to assist him in carrying passengers across between Liverpool and Rock Ferry, there being an unusual number of passengers on that day, owing to a regatta. Hetherington paid the company 10*l*. 10*s*. for the use of the steam tug for that day, he receiving the ferry fares from the passengers, and the company supplying and paying the master and crew. The plaintiff was a yearly contractor with Hetherington, and was entitled to cross by Hetherington's ferry when and so often as he chose. On the day in question he went on board the steam tug, at Liverpool, from Hetherington's landing pier, for the purpose of so crossing. On arriving at Rock Ferry, a bolt, attached to a rope thrown out from the tug to attach it to the pier, broke, through the mismanagement of the master and crew, and struck and injured the plaintiff, who was standing upon the deck.

"I take it to be shewn by the evidence that the plaintiff had made a contract with Hetherington to be conveyed across the ferry; and, for the purpose of being so conveyed, went on board the vessel hired, with its crew, for that purpose, by Hetherington from the defendants, and, while on board, suffered injury from the negligence of the crew. The question is, are the defendants liable for that negligence? They were, by their crew, in possession of the vessel; and I am of opinion that, if the negligence in question had injured a mere stranger, not on board, but standing, for instance, on the pier at the time, they would have been liable. That is established by *Quarman* v. *Burnett* (1840), 6 M. & W. 499, and *Fenton* v. *The City of Dublin Steam Packet Company* (1838), 8 A. & E. 835. Then, can the plaintiff lose a right of action which he would have had as a stranger merely because he was a passenger for hire paid to Hetherington, and not to the defendants? He clearly loses no right of action against them, though he may possibly acquire an additional right against Hetherington: *Pippin* v. *Sheppard* (1822), 11 Price, 400; *Gladwell* v. *Steggall* (1839), 5 Bing. New Cas. 733; and *Marshall* v. *The York, Newcastle, and Berwick Railway Company* (1851), 11 C.B. 655, decide that the question whether there was an actual retainer of the defendants by the plaintiff for hire does not affect their liability for negligence of this character" (*Dalyell* v. *Tyrer* (1858), El. Bl. & El. 899, at pp. 905, 906: *Erle*, J.).

Hire of Horse and Driver for a Water-cart—Negligence of Driver.

5. "I am of opinion that this case is governed by *Laugher* v. *Pointer* (1826), 5 B. & C. 547, and *Quarman* v. *Burnett* (1840), 6 M. & W. 499. In the latter case an elaborate and unanimous judgment was delivered, and the opinion of *Abbott*, C.J. and *Littledale*, J., in *Laugher* v. *Pointer* was preferred to that of *Bayley* and *Holroyd*, JJ., who had differed from the other two learned judges. The facts of the present case are very like those in *Quarman* v. *Burnett*. The water-cart belonged to the defendants, and the driver and horse were hired by them from Mrs. Dean. In *Quarman* v. *Burnett* the carriage belonged to the defendants, who hired the horses and a driver from a job-mistress; and the court held that the defendants were not liable for injury sustained by the plaintiff through the negligence of the driver. In the present case the negligence must be that of the driver of the water-cart. The only valid distinction that I can see between the two cases is that here the defendants' inspector directed the driver what streets to water; but that fact does not in any way make the inspector guilty of negligence or responsible for the act of negligence which was committed. If he had interfered

when the accident happened by directing the driver of the cart what to do, the case would be different, but he did no more than point out the streets to be watered. I think the discretion and control exercised by the owners of the carriage over the driver in *Quarman* v. *Burnett* was larger than the discretion and control exercised by the inspector over the driver of the water-cart in this case. I can see no valid distinction in principle between the two cases, having regard to the reasoning of the judgment of the court delivered by *Parke*, B., in *Quarman* v. *Burnett*, which has been followed and approved in numerous cases" (*Jones* v. *Corporation of Liverpool* (1885), 14 Q. B. D. 890, at pp. 892, 893 : *Grove*, J.). (4)

In close connection with the subject just considered is the letting out of cabs by cab proprietors to cabmen. The latter being the hirer of the cabs and horses, their relation one to another will, therefore, be considered next.

(c) Cab Drivers and Cab Proprietors.

Independently of the Acts of Parliament relating to the subject, the relation between cab proprietors and cab drivers is that of letter and hirer, and not that of master and servant.

Acts of Parliament, however, relating to the subject make the relation between cab proprietors and cab drivers that of master and servant so far as to render the proprietor responsible for the negligent acts of the driver done while acting in the course of and within the scope of his employment. The above statements are fully borne out by the following excerpts :

"The first question that arises is, whether the relation of master and servant existed between the defendant and the cab driver, so as to render the defendant responsible for the damage caused by the driver. I agree that, independently of the Acts of Parliament relating to this subject, the relation between them would be that of bailor and bailee, not that of master and servant. The cab proprietor hands over the horse and cab to the charge of the driver, to be used by him for the purpose of plying for hire at his own discretion and not subject to the proprietor's control. So far I agree with the reasoning of the majority of the court [*Byles* and *Grove*, J.J.] in the case of *Fowler* v. *Lock* (1874), L. R. 7 C. P. 272. But I think that the provisions of the Acts of Parliament

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Canadian Cases.

(4) The defendant hired a tug from the plaintiff by a contract signed by both parties in these words: "I agree to charter tug . . . . to tow two barges from . . . . for which I agree to pay . . . owner to supply engineer and captain." The tug on the voyage was run on a rock through the negligence of the captain :—*Held*, not a demise of the tug, but a contract of hiring, and that the defendant not liable for the damage (*Thompson* v. *Fowler* 23 O. R. 644).

alter what would otherwise be the relation of the proprietor and the driver, and for the protection of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver. But then it is contended that the liability of the master only exists with respect to acts done by the driver within the scope of his employment, and that the driver here was not acting within the scope of his employment. To determine whether the driver was so acting or not it is necessary to consider what the terms were upon which the cab was intrusted to the driver. If the employment of the cab by the driver at the time when the mischief was done was wrongful, in the sense that it was beyond the scope of the bailment, then the master would not be responsible; because it is with regard to the employment of the cab within the scope of such bailment that the relation of master and servant is created by the statutes for the protection of the public" (*Venables* v. *Smith* (1877), 2 Q. B. D. 279, at pp. 282, 283: *Cockburn*, C.J.).

"It seems to me that the decision in *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, interpreted the Act of 1843 [(6 & 7 Vict. c. 86) The London Hackney Carriages Act] as having this effect—that when the driver of a hackney carriage in London does an act which under the ordinary law would give a right of action against his master, in the ordinary sense of that word, an action can now be maintained against the registered proprietor of the hackney carriage, even although the driver is not according to ordinary law his servant. That, in my opinion, is the meaning of that decision. If, therefore, the driver of a hackney carriage does that which amounts to a breach of contract with a person who hires the carriage—for instance, if he loses his luggage—the owner of the luggage can maintain an action for damages against the registered proprietor of the carriage, although the driver was not his servant. This was decided in *Powles* v. *Hider* (1856), 6 E. & B. 207. The same principle was applied in *Venables* v. *Smith* (1877), 2 Q. B. D. 279 to an action against the registered proprietor of a cab for personal injury caused to one of the public by the negligence of the driver. These two cases and *King* v. *Spurr* (1881), 8 Q. B. D. 104, were considered by this court in *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, and we had then to determine whether we would adopt the ruling in *Powles* v. *Hider* (1856), 6 E. & B. 207, and *Venables* v. *Smith* (1877), 2 Q. B. D. 279 in its full sense. It appears to me that this court did then adopt the ruling in those cases in its full sense, and held that the true

interpretation of the Act is that which I have stated" (*Keen* v. *Henry*, [1894] 1 Q. B. 292, at pp. 293, 294: Lord *Esher*, M.R.).

(d) Letter's Right of Action for Injury to the Things Hired.

The letter cannot bring trover for the conversion of the thing out on hire.

The letter can bring an action for damages against a third person who permanently injures the thing out on hire.

That the above propositions are settled law is shown by the cases following:

1. The plaintiff was the owner and proprietor of two horses which were let to hire for a certain term to a Dr. Carey. While they were in his possession and drawing his carriage the defendant drove a cart with great impetuosity and violence against them, whereby one of them was killed.

"This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses; and according to the authority of *Gordon* v. *Harper* (1796), 7 T. R. 9, he neither could have maintained trespass nor trover for them. This is not like a gratuitous permission to use a chattel, as in *Lotan* v. *Cross* (1810), 2 Camp. 464, where the possession constructively remained in the owner. The horses were let to hire for a certain term to Dr. Carey, who had a right to retain them till that was expired, and who was driving them by his own servants when the mischief was done. Case, therefore, was here the proper and only remedy" (*Hall* v. *Pickard* (1812), 3 Camp. 187, at pp. 187, 188: Lord *Ellenborough*).

2. "*Gordon* v. *Harper* (1797), 7 T. R. 9, which must now be considered as settled law, shows, that if a person has an interest in goods for *a certain time*, by agreement with the owner, the latter, during the time that he is not in possession, cannot maintain trover against a wrong doer who takes the goods. That case might, with propriety, have been differently decided in the first instance; but it has been followed by others" (*Manders* v. *Williams*, (1849) 4 Ex. 339, at p. 343: *Parke*, B.).

3. "This is an action brought by the owner of a barge to recover damages for injury done to it by the negligence of the defendants' servants whilst it was out on hire to a third person. The question is, whether the owner of the barge has a right to maintain an action for that injury. In my opinion he has that right, the mere temporary outstanding interest in the hirer of the barge amounting to nothing. That trover will not lie for the conversion of a chattel out on loan is clear: *Gordon* v. *Harper* (1796), 7 T. R. 9. But in *Tancred* v. *Allgood* (1859), 4 H. & N. 438, it was by

implication held that an action for a permanent injury done to a chattel while the owner's right to the possession is suspended, may be maintained" (*Mears* v. *The London and South Western Rail. Co.* (1862), 11 C. B. (N.S.) 850, at pp. 853, 854: *Erle*, C.J.).

"It is fully established, that, in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but in case of a hiring, the owner cannot bring trover, because he has temporarily parted with the possession. It seems to me, however, to be clear, that, though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted, that, where there *is* a permanent injury, the owner may maintain an action against the person whose wrongful act has caused that injury" (*ibid.*, at p. 854: *Williams*, J.).

Compare also *ante*, p. 83, Chapter II.—Deposits, Section VIII. —Action for Return of Deposit or its Value, and Damages for its Detention; and *ante*, p. 130, Chapter IV.—Loans for Use, Section VI.—Right of Action of Lender.

SECTION IV.

HIRER'S DUTY AND RESPONSIBILITY.

(a) Hirer's Negligence.

"The *hirer* of a *thing* is answerable for *ordinary* neglect" (Jones, 120) (5). See *ante*, p. 17, as to the phrase "ordinary neglect."

"The care and diligence [on the part of a hirer] must rise in proportion to the demand for it; and things which may be easily

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Canadian Cases.

(5) The hirer of a chattel is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use in keeping their own goods of the same kind. (*Per Armour*, J., in *Reynolds* v. *Roxburgh*, 10 O. R. 649.)

"The distinction between slight, ordinary, and gross negligence as the foundation of liability does not seem to rest upon any sound judicial basis.

"The correct rule seems to be to pay regard to the degree of diligence which the situation assumed by a person demands rather than to his carelessness. If much is required of him, a slip from the narrow path of duty may well be called slight negligence. If no more is due from him than the care which a prudent man bestows upon his own affairs, failure to give that degree of care may be conveniently termed ordinary negligence. If trifling care would suffice for the discharge of duty, and that is not given, there is no harm in calling it gross negligence. But the substantial question always must be, whether that care has been exhibited which the special circumstances reasonably demand." (*Per Moss*, C.J.A., in *Fitzgerald* v. *Grand Trunk Railway*; Tupper's Reps. U. C., vol 4, 601.)

deteriorated require an increase of care and diligence in the use of them. Negligence is a relative term; and the value and liability to injury of the article, and the means of security possessed by the hirer, are material circumstances in estimating the degree of care and diligence which are required of him" (Story, s. 406).

The responsibility of the hirer is to take *reasonable* care of the goods hired. The reasonableness of the care will in every case depend upon its own circumstances. See also *ante*, p. 12, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect.

The following is an example of not taking reasonable care of the thing hired:

Improper Treatment of a Horse.

Action for the improper treatment of a horse, let to hire by the plaintiff to the defendant.

The defendant jobbed a pair of coach horses of the plaintiff, one of them being slightly indisposed, the defendant wrote a prescription for him, and treated him improperly.

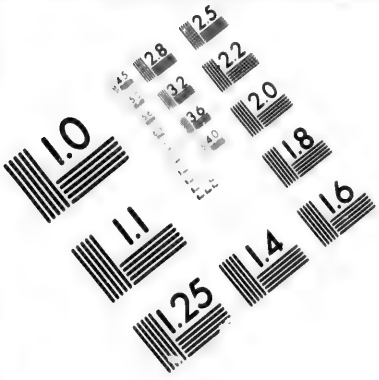
Lord *Ellenborough*.—"The question is, whether the defendant has been guilty of gross negligence with respect to the horse. Had he called in a farrier, he would not have been answerable for the medicines the latter might have administered: but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse; and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse of the plaintiff" (*Dean* v. *Keate* (1811), 3 Camp. 4).

Larceny.

If the hirer has not been guilty of any negligence, and the thing hired is stolen, he is not liable to an action for negligence. See *ante*, p. 41, Chapter I.—Introductory, Section VIII.—Larceny from Bailees.

Misuser by Infant.

As we have seen (*ante*, p. 10, Chapter I.—Introductory, Section II.—(h) Parties to a Contract of Bailment), an infant cannot contract, except for necessaries, and, therefore, for want of capacity to contract, he cannot be a party to a hiring of a thing, unless it is a necessary. Assuming, however, that the particular hiring was not a necessary, but that the thing hired was injured while being used, and while in his possession under the void contract, the question arises who is liable for such injury? The answer to



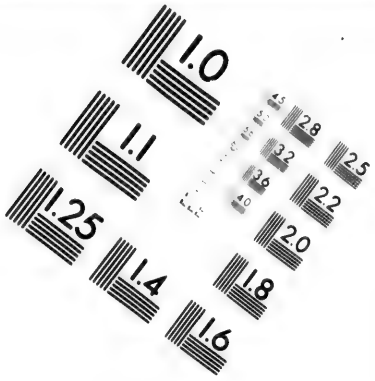
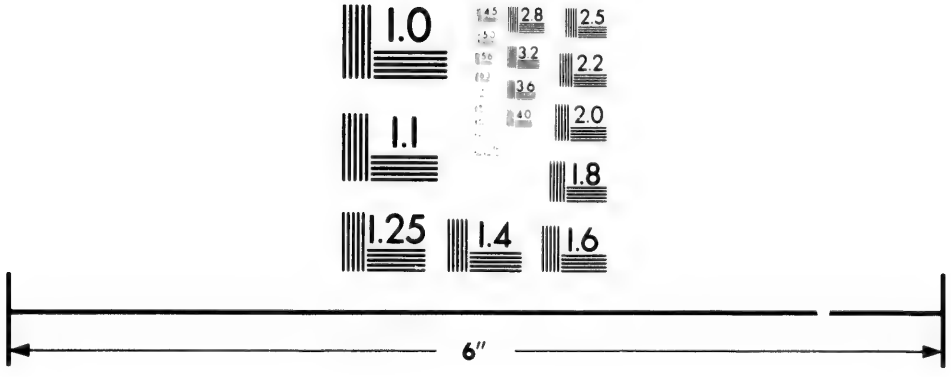
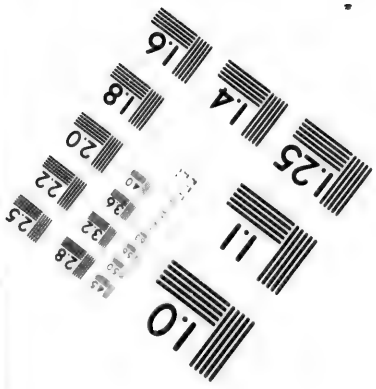
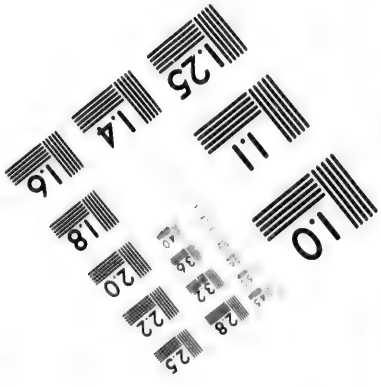


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this question depends upon the answer to another question, whether the injury done is independent of and beyond the hiring contract and an *independent tort*. If the latter, an action will lie in tort. Doubtless instances of misuser daily occur in the hiring by infants of bicycles, boats, horses and carriages. The law on this subject is to be found in the following extract:

"The question in this case is, not whether upon the evidence we may think that the contract entered into between the plaintiff and the defendant [an infant] has been broken by the latter but, whether or not it appears that something in the nature of a wrong has been done by the defendant, independently of and beyond the contract, for which an action on the case will lie. Now I am of opinion that the plaintiff's action is well founded. There is no doubt that the defendant broke the contract, and as to that infancy is a defence; but where, in addition to that, something has been done beyond the contract which amounts to a tort, then infancy is no defence. The question has recently been very well treated by Mr. Pollock in his excellent work, 'Principles of Contract,' where, at pp. 52, 53, in discussing the liability of infancy in such cases, and commenting on the authorities, he says that 'the rule that an infant cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract, is decidedly laid down in *Jennings* v. *Rundall* (1799), 8 T. R. 335, where it was sought to recover damages from an infant for over-riding a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of the contract, and such that but for the contract there would have been no opportunity of committing it, is, nevertheless, independent of the contract in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable. The distinction is established and well marked by a modern case in the Common Pleas'; and the learned author then refers to the case which has been cited by Mr. Nasmyth, of *Burnard* v. *Haggis* (1863), 14 C. B. (N.S) 45, as establishing the distinction. In that case the horse was used in a manner positively forbidden by the contract, and it was held to be a trespass and an independent tort, for which the infant defendant was liable; and so in the present case the over-driving and flogging, and all that was done by the defendant, by which the plaintiff's mare was injured was *ultra* the contract altogether, and constituted a separate and independent tort on his part, to which his defence is in substance the old plea of 'Not guilty,' and on that he is liable, and the plea of infancy is no defence" (*Walley* v. *Holt* (1876), 35 L. T. 631, at p. 632: *Kelly*, C.B.).

Joint Hiring.

In *Davey* v. *Chamberlain* (1802), 4 Esp. 229, Lord *Ellenborough* said, that if a person, driving his own carriage, took in another person into it as a passenger, such person could not be subjected to an action, in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the king's subjects required that both should be answerable for any accident arising from the misconduct of either in the driving of the carriage, while it was so in their joint care. See *post*, p. 223, *The Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, as to the latter proposition.

Proof of Negligence.

Assumpsit for not taking proper care of a horse hired by the defendant of plaintiff.

The plaintiff proved the hiring of the horse; that it was returned to him with his knees broken in consequence of a fall whilst used by the defendant; and that the horse had before that time been often let out to hire, and had never fallen down.

Le Blanc, J., said that the plaintiff must give *some* evidence of negligence; and as he had given none in this case, the plaintiff must be nonsuited (*Cooper* v. *Barton* (1810), 3 Camp. 5 note). (6) See also *ante*, p. 36, Chapter I.—Introductory, Section VI.—Duties of Judge and Jury in Questions of Negligence.

(b) Hirer's Servant's Negligence.

The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant, or, in other words, the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform.

There is a difference between the hirer's liability to the *owner* and his liability to a *stranger* injured by the negligence of a person who is not the hirer's servant, and who, for instance, may be driving the hired horse and trap, *e.g.*, the hirer's partner or his friend. In such a case the hirer is not responsible for the injury done to a

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Canadian Cases.

(6) A person hiring a horse to perform a journey is not liable for the value of the horse if he dies on the road without fault of the hirer (*Dickie* v. *Campbell*, N. B. R., Stephen's Digest, 1880, 203.

stranger, which is a responsibility arising out of *tort*; but he is responsible to the owner for the injury done to the horse and trap by the negligence of the driver, which is a responsibility arising out of *contract*.

The law above stated is clearly laid down in the following authorities, arranged in chronological order:

1. "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment" (*Croft* v. *Alison* (1821), 4 B. & Ald. 590, at p. 592: *per curiam*).

2. "I think the judgments of *Maule* and *Cresswell*, JJ., in *Mitchell* v. *Crassweller* (1853), 13 C. B. 237, express the true view of the law, and the view we ought to abide by; and that we cannot adopt the view of *Erskine*, J., in *Sleath* v. *Wilson* (1839), 9 C. & P. 607, at p. 612, that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey" (*Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476, at p. 479: *Cockburn*, C.J.).

3. "Although a definition is difficult, I should say that the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform. All the cases tend to show, and *Mitchell* v. *Crassweller* (1853), 13 C. B. 237, and *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476, point out clearly that line of distinction; in one case a servant was employed to drive his master's cart, and after coming home to the stable started off on a fresh journey for his own purposes, and during that second journey, which was not incident in any way to his employment, an accident happened; in the other case, which goes a little further, before the servant put up the cart he turned off and went in another direction making a detour, and an accident happened; in both those cases the

master was held not liable" (*Stevens* v. *Woodward* (1881), 6 Q. B. D. 318, at p. 321: *Grove*, J.).

4. "The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant, instead of taking the horse and carriage to his master's stable in the ordinary course of his duty, for his own purposes and to serve a friend takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while thus engaged contrary to his duty. . . . . Where a man hires a horse and carriage, there is an implied obligation on his part arising out of the contract to return them in the condition in which he received them, fair wear and tear and certain accidents excepted; and, if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the letter's remedy is by action on the contract, and can be enforced against the hirer only and not against his servant. That there is a difference between the hirer's liability to the owner and his liability to a wayfarer injured by the negligence of the person driving the carriage is plain from the following instances. A. hires a horse and carriage for a year, and lends it for a day to B., who negligently drives over and injures C., at the same time injuring the horse and carriage. In that case A. is not responsible to C. because B. is not his servant, and consequently the maxim *respondeat superior* does not apply; but he is responsible to the owner of the horse and carriage for the damage done by B.'s negligence. So, again, if two partners hire a horse and cart for the purposes of their business, and one of them, while driving the cart in the usual course of their business, negligently runs against and injures a person passing along the highway and at the same time injures the horse and cart, the partner driving is alone responsible to the person injured, but both partners are responsible to the person from whom they hired the horse and cart. The responsibility of the hirer to the person from whom he hires is a responsibility out of contract, his responsibility to a person run over by the negligent driving of the horse and cart arises out of tort. Is there any authority for saying that the responsibility of the hirer to take reasonable care of the goods hired does not extend to all injuries caused by the negligence of his servant to whom he has intrusted the care of them? Mr. Wills cited the cases of *Finucane* v. *Small* (1795), 1 Esp. 315, and *Foster* v. *The Essex Bank* (1821), 17 Massachusetts Reps. 479 [cited in *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317] in which it was held that the hirer was not responsible where his servant had stolen the goods hired. In those cases there was

an act of the servant which was tortious as against the letter of the goods, and which gave him a right of action against the servant for a conversion of the goods. But in this case the act of the servant was not tortious as against the owner of the horse and carriage. If the horse and carriage had got back safely to the stables, the owner would have have had no right of action against the servant; for, although the servant, as against his master, would have committed a breach of the duty arising out of the relationship of master and servant, he would not have been guilty of any tortious act as against the owner. Such an act would certainly not have amounted to a conversion of the horse and carriage by the servant, nor as against the owner would it have amounted to a trespass, seeing that the person who was entitled to the possession of the horse and carriage during the period occupied by the journey was the hirer, and not the owner. Nor could the fact that the horse and carriage were injured during the journey give the owner a cause of action against the servant, because it was not the owner who had intrusted the horse and carriage to the servant, but the hirer, his master, and consequently the duty of the servant to take care of them was a duty arising out of the relationship of master and servant, and owing to the master, and was not a duty owing to the owner, because there was no contractual relationship between the servant and the owner. The hirer could maintain an action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged; but the owner could maintain no such action, because, as we have pointed out, there was no invasion by the servant of the latter's right of ownership, and no contractual relation between them.

"If we consider the case on the general principles of [illegible] public benefit, we arrive at the same result. Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If under these circumstances, the loss is to fall on the owner who does not engage and cannot dismiss the servant, and who cannot recover against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more

expensive. If the loss is to fall on the hirer it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant.

"No case in point can be found on either side of the question; but, on the general considerations set out above, we are of opinion that the hirer is liable" (*Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413, at pp. 414—417: *Cave*, J., delivering the judgment of the court (*Cave* and *Charles*, JJ.)).

(c) Expenses.

We have seen (*ante*, p. 208, Section III.—(a) Letter's Warrant of Fitness of Thing Let), that the party letting warrants the reasonable fitness of the thing let and undertakes to keep it reasonably fit, and he should charge his customer enough to cover the expenses of so doing. Other expenses may be payable by the letter or the hirer, according as it is provided for by the express terms of the contract, or is implied by the certain and general custom or usage of the particular trade or business, or the previous course of dealing between the parties. The three cases following are in point. (7)

1. "The natural presumption and intendment of law is, that a party who borrows a horse is bound to keep it, unless, at the time, something is said to the contrary" (*Handford* v. *Palmer* (1820), 2 Brod. & Bing. 359, at p. 360: *Dallas*, C.J.).

2. "As between him [a person who makes it his business to let out carriages for hire] and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses" (*Hyman* v. *Nye* (1881), 6 Q. B. D. 685, at p. 688: *Lindley*, J.).

Contract to keep in Perfect Repair without any further Charges whatever.

3. The plaintiff, a carriage-builder, let a gig to the defendant on hire. By the written agreement between them the plaintiff

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Canadian Cases.

(7) See *Reynolds* v. *Roxburgh*, *ante*, p. 208.

agreed "to keep the same in perfect repair . . . without any further charges whatever." By an accident the gig was much damaged. Such accident did not arise from any negligence or improper driving of the defendant, but entirely from the furious driving of a third person, who was driving another carriage along the road, and improperly struck against the defendant's gig.

Denman, C.J., said, he was clearly of opinion that the terms of the agreement subjected the plaintiff to the expense of repairs, although these repairs might have become necessary in consequence of an accident happening to the gig. Even if it had been shown that the accident was attributable to the defendant himself, he was not prepared to say that the plaintiff could recover; for, looking to the terms of the agreement, it seemed to him that the only case in which the defendant could be subjected to the expense of the repairs was the case of damage happening to the gig through the *wilful default of the defendant*. With regard to the evidence of the usage of the trade, the language of the agreement between the parties being clear and unequivocal, evidence as to the general usage of the trade could not be of any avail (*Reading* v. *Menham* (1832), 1 Moo. & Rob. 234, at pp. 236, 237).

SECTION V.

REDELIVERY.

From the definitions of the word bailment, given (*ante*, p. 6) in Chapter I.—Introductory; Section II.—(c) Some Definitions of the word Bailment, the goods must be redelivered as soon as the time or use for which they were bailed shall have elapsed. The thing hired, therefore, must be redelivered when the hire is determined. Of course, the thing must not be redelivered in any worse condition, due to the hirer's neglect or default, than when he received it on hire. Sometimes there is a special stipulation in the contract with respect to this, as in the case subjoined. (8)

Canadian Cases.

(8) When the lessee of goods covenanted to restore them to the lessor "at the expiration of the term, in as good order as they then were, reasonable wear and tear only excepted," and the goods during the term were destroyed by fire without the lessee's default:—*Held*, that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term (*Chamberlen* v. *Trenouth*, 23 U. C. C. P. 497; followed in *Boswell* v. *Sutherland*, 32 U. C. C. P. 133).

In the latter case, it was held that a contract to produce goods and chattels embraced in a chattel mortgage was subject to implied condition; that if before

One Schroder hired a barge of one Ward. Schroder was to be responsible for all loss and damage to the barge, fair wear and tear to be allowed by Ward; and when given up, to be in good working order, with all her rigging, gear, and implements complete.

"We are all agreed that the words 'good working order' must be construed relatively,—good with reference to the purposes which a barge of such an age and condition was capable of being used for,—the same sort of order it was in when the hiring took place, fair wear and tear excepted" (*Schroder* v. *Ward* (1863), 13 C. B. (N.S.) 410, at p. 413: *Erle*, C.J.). (9)

SECTION VI.

HIRER'S POSSESSORY INTEREST AND RIGHT OF ACTION.

The reader is referred to (*ante*, p. 38) Chapter I.—Introductory; Section VII.—Property in Goods and Chattels, from which it is clear that the hirer has a special property in the thing hired.

"*Locatio*, or *locatio-conductio*, *rei*, is a contract by which the hirer gains a transient qualified property in the *thing* hired" (Jones, p. 85).

"By the common law, in virtue of the bailment, the hirer

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breach performance becomes impossible because the specific articles have without default of the obligor ceased to exist, performance is excused.

It may, we think, be safely asserted to be now law, that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this responsibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower and the bailee from the performance of his promise to redeliver the chattel (*Armour*, J.: *Reynolds* v. *Roxburgh*, 10 R. R. 657). See, also, *Gould* v. *Blanchard*, *ante*, p. 5.

(9) The plaintiff sought to recover damages for not returning his schooner, the *Mary Grover*, in the same good order and condition as when delivered to the defendant, reasonable wear and tear excepted, the anchor and chain having been lost:—*Held*, that the loss of the anchor and chain was not within the exception in defendant's covenant of reasonable wear and tear. *Per McLean*, J.: "The anchor and chain were among the appurtenances necessary to the ship being in good order." *Per Burns*, J.: "I do not find any distinction in construing charter-parties of vessels from other contracts, and the lease of a ship with covenants would be construed the same as a lease of any other description of property. Under this covenant, therefore, to return the vessel in good condition, reasonable wear and tear excepted, if total loss occurred the lessee would have been bound to make it good. I take the rule to be that it applies to the different parts leased as well as to the whole, and that the anchor and chain should be restored, reasonable wear and tear excepted, if there be nothing to qualify defendant's liability" (*Anglin* v. *Henderson*, 21 U. C. Q. B. 27).

acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it, or any injury to it, during the existence of his right" (Story, s. 394).

The following case illustrates the above law:

The plaintiffs, who were livery-stable keepers, had hired a chariot for the day of certain coach-makers. The plaintiffs furnished the horses, and appointed the coachman, and then let it out to an individual for the day. The defendant's coach struck and damaged the chariot.

"As to the first point [whether the plaintiffs could properly be called the owners and proprietors of the chariot], it has never been supposed that a mere passenger in a carriage can be considered as the owner and proprietor, so as to be entitled to bring this action. The plaintiffs, however, are something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may, therefore, be considered, for the purposes of this declaration, as the owners and proprietors of the chariot" (*Croft* v. *Alison* (1821), 4 B. & Ald. 590, at p. 592: *per curiam*. See also *ante*, p. 73, Chapter II.—Deposits; Section V.—Possessory Interest and Right of Action of Depositary, and the cases of *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, and *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, at p. 394, *ante*, at pp. 77, 78).

SECTION VII.

DETERMINATION OF HIRE CAUSED BY THE LETTER'S OR HIRER'S CONDUCT.

Sale by Letter—Rescission of Contract.

The plaintiff was a coachmaker. The defendant went to him and hired a phaeton for five weeks at five guineas a week, and returned the same after two or three days. *Best*, C.J., told the jury that if the carriage had been sold [by the plaintiff] within the five weeks that would have been a rescinding of the contract, and the plaintiff would not have been entitled to the sum claimed; but as that did not appear to be the case, he was entitled to a verdict for the five guineas a week (*Wright* v. *Melville* (1828), 3 C. & P. 542).

An act of the hirer which is entirely inconsistent with the terms of the hiring, though not amounting to a destruction of the thing hired, is a determination of the hiring, and causes the possessory title to revert to the letter, and entitles him to maintain an action of trover.

Where there has been a misuser by the hirer of the thing hired, as by its destruction or otherwise, there is an end of the hiring, and an action for trover is maintainable for the conversion.

In support of the above rules I cite the following authorities:

Sending Hired Goods to an Auctioneer to be Sold.

1. "I am of opinion that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion" (*Loeschman* v. *Machin* (1818), 2 Stark. 311, at p. 312: *Abbott*, J.). (10)

Cited and approved of by *Tindal*, C.J., in *Cooper* v. *Willomatt* (1845), 1 C. B. 672, at p. 682.

Misuser by Hirer.

2. "As to the other point, we are clearly of opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which the goods had been bailed to the defendants.

"The case of *Cooper* v. *Willomatt* (1845), 1 C. B. 672, is a decisive authority upon this point. It was there held, that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the

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(10) The plaintiff's servant, one O., being in charge of his horses, sold one without the plaintiff's authority to the defendant's wife, who had the management of the defendant's business, receiving 20 dollars in cash and defendant's note for 55 dollars, payable to O. Afterwards, meeting O., the plaintiff got from him the note and 17 dollars in cash. The plaintiff demanded the horse from the defendant's wife, and offered her the note and 17 dollars in cash, which, however, she did not take. He then brought detinue:—*Held*, plaintiff entitled to recover; for that he was not bound to tender to the defendant the note and the money he had received, nor could defendant retain the horse until he had received them (*Morton* v. *Stone*, U. C. Q. B. 30, 158).

Where plaintiff had lent a piano on a hire-purchase agreement to J., and the defendant, J.'s landlord, distrained upon it for rent, and bought it on sale by bailiff:—*Held*, that piano was plaintiff's property, and that the sale to defendant passed nothing; for, as landlord, he himself could not purchase goods sold by his bailiff under 2 W. & M. sess. 1, ch. 5, s. 2, and although, as between J. and defendant, defendant's claim might be complete by a subsequent arrangement with J., yet the plaintiff (the owner) was not bound by it (*Williams* v. *Grey*, 23 C. P. 561).

purchase was *bonâ fide*. The cases on the subject are referred to there. The rule is, that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion" (*Bryant* v. *Wardell* (1848), 2 Ex. 479, at p. 482: *Pollock*, C.B.). (11)

For a Bailment at Will the same Rules hold good.

3. "So in *Wilkinson* v. *King* (1809), 2 Camp. 335, *Loeschman* v. *Machin* (1818), 2 Stark. 311, and *Cooper* v. *Willomatt* (1845), 1 C. B. 672, it would rather seem that the bailment was for a time certain, viz., in each case from week to week; no distinction, however appears to have been made by the court between such a bailment and one at will. But it was held, that the act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, was a determination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover" (*Fenn* v. *Bittleston* (1851), 7 Ex. 152, at p. 159: *Parke*, B.). (12)

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(11) The hiring of a piano under an agreement by which on certain payment the piano becomes the property of the borrower, but until such payment it remains the property of the lender, will not enable the borrower to transfer the property to a third party (Tupper's Reps.). See also *Mason* v. *Bickle* 2 O. A. R. 291, and *Nordheimer* v. *Robinson*, 2 O. A. R. 305.

The plaintiffs, makers of the safes at Toronto, sold a safe to one H., of London, on a written order stipulating that he was to give his notes at four and six months for the price; that his name was to be painted on the front of the safe; and that no title to the safe was to pass to H. until full payment of the price agreed upon. H., having sold the safe to the defendant without payment for it:—*Held*, that the plaintiffs were not estopped from proving their ownership of the safe (*Walker* v. *Hyman*, 1 Tupper's Appeal Rep. 345. *Stevenson* v. *Rice*, 24 C. P. 245, followed).

The rule is that when there has been a misuser of the thing lent, there is an end of the bailment, and trover is maintainable (*Sibley* v. *Sibley*, 2 Geldert & Oxley, N. S. 325)

When a person hiring from another a horse and waggon with seats for two persons, places three therein, and the horse on the journey sickens and dies, he will be liable because of the misuser (*Casey* v. *Archibald*, 2 Thompson, N. S. 4).

(12) The defendant hired a piano from plaintiff, and the hiring agreement further provided that defendant, by paying a fixed sum, could make the piano his own:—*Held*, that this agreement was a contract of bailment only, and that the property in the piano did not pass until payment (*Mason* v. *Johnson* 27 C. P. 208). See also *Blackley* v. *Dooley*, 18 O. R. 381.

SECTION VIII.

EXECUTION.

The sheriff may seize the thing hired for a certain time during such time, and neither the letter nor the hirer can maintain trover.

Trover for a Pianoforte.

1. One Evans hired of the plaintiff a pianoforte, at a monthly rent. The piano was seized by the defendant, as sheriff, under a writ of *fi. fa.* before the end of the first month.

"I am not aware that the case of *Gordon* v. *Harper* (1796), 7 T. R. 9, has been overruled; it is cited in the last edition of Selwyn's *Nisi Prius*, without any notice that it has been overruled. I think myself bound by that case; the principle on which it proceeds is, that the plaintiff has neither the possession or right of possession of the goods at the time they are taken, and therefore the allegation, that 'he was lawfully possessed,' is not supported by the evidence" (*Pain* v. *Whittaker* (1824), Ry. & Moo. 99, at p. 100: *Abbott*, L.C.J.).

2. "It is clear, therefore, that the sheriff cannot sell an interest of this description [a lien], which is a mere personal interest in the goods. The case is quite different from those referred to, in which goods were let on hire for a certain period, because there the person hiring them has the absolute use of the goods for a particular term, and that interest may be disposed of" (*Legg* v. *Evans* (1840), 6 M. & W. 36, at p. 42: *Parke*, B.).

CHAPTER VIII.

HIRE OF WORK, LABOUR AND SERVICES.

SECTION I.—*Definitions and Classifications*, p. 232.
SECTION II.—*Contract for Work, Labour and Services*, p. 233.
SECTION III.—*Employer's Rights, Duty and Responsibility*, p. 234.
SECTION IV.—*Employee's Rights, Duty and Responsibility*, p. 236.
SECTION V.—*The Reward*, p. 243.
SECTION VI.—*Possessory Interest of Employee*, p. 251.
SECTION VII.—*Redelivery*, p. 252.
SECTION VIII.—*Employee's Lien*, p. 253.
SECTION IX.—*Execution*, p. 262.
SECTION X.—*Distress*, p. 263.

In this chapter the second class of hire will be dealt with. This class—Sir *William Jones* says at p. 90—"which is properly divisible into two branches, namely, *faciendi* and *mercium vehendarum*, has a most extensive influence in civil life; but the principles by which the obligations of the contracting parties may be ascertained, are no less obvious and rational than the objects of the contract are often vast and important," and *Story* says (s. 421) "Each of these [branches] will be treated separately, as each is of very extensive use and influence in the business of civil life; and each in some respects involves, or may involve, distinct principles and considerations."

SECTION I.

DEFINITIONS AND CLASSIFICATIONS.

"*Locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or bestowed on the thing delivered" (Jones, p. 36).

"*Locatio operis faciendi*" may, again, be divided into two kinds:

(1.) The hire of Labour and Services, or *Locatio operis faciendi*, strictly so called; such as the hire of tailors to make clothes, of jewellers to set gems, and of watchmakers to repair watches.

(2.) *Locatio custodiæ*, or the receiving of goods on deposit for a reward for the custody thereof, which is properly the hire of care and attention about the goods" (Story, s. 422).

It is only the first kind that will be dealt with in this chapter. The second kind will be dealt with in the next chapter.

The English language does not possess a single word which is solely used as a *general* name for a hirer *for reward* of work, labour or service, nor a single word for him whose work, labour or service is hired for reward. The word "hireling" being now used generally in a bad sense would not be appropriate, or at all acceptable, to the multitude of good and honest persons who receive pay for their work, labour or services performed or bestowed on goods and chattels.

"In the common law, such agencies and labour and services only are included under the head of bailments, as are employed about personal property intrusted by the owner to the bailee" (Story, s. 423).

"In the common law, it is treated as a case of bailment only when the stock or materials belong to the employer. Where the principal materials belong to the employer, the case is still treated as a mere bailment, although the workman may furnish some accessorial materials or ornaments. Thus, if A. sends cloth to a tailor to be made into a garment, and the tailor furnishes buttons and twist to complete it, it is a mere case of *locatio operis faciendi*" (Story, s. 423). (1)

SECTION II.

CONTRACT FOR WORK, LABOUR AND SERVICES.

"Contracts for work and services, like all other contracts of letting and hiring, are perfected by the bare consent of the parties, so that, as soon as the mutual promises are exchanged, the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labour to the employer or letter of

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(1) A contractor or workmar entering upon land to quarry stone under the Rideau Canal Act gains no property in the stone by severing it from the freehold. When it is quarried it belongs to the Crown, or, if the Crown does not take it, to the owner of the land, and therefore an assignment by the workman who quarried the stone is void. The stone being enhanced in value by dressing, etc., would not change the property so as to render it that of the manufacturer; it would still remain the original owner's (*Mittleberger* v. *By*, U. C. Q. B. (o.s. II.) 379; *Baker* v. *Flint*, U. C. Q. B. (o.s. III.) 89).

the work. If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer, and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work, and the other to provide it and pay for its execution, there is no binding contract at all, unless the engagement is under seal. The workman in such a case is not bound to enter upon his task; nor is the other party bound to provide the work and pay the hire. But, when the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work, nor the employer to employ him. The law generally implies a promise from the employer to pay a reasonable compensation for services rendered, unless it appears that the services were to be gratuitous, or that the workman relied for payment upon a particular fund, and not upon the personal responsibility of the employer. When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract" (Addison on Contracts, 7th edit., p. 657).

SECTION III.

EMPLOYER'S RIGHTS, DUTY AND RESPONSIBILITY.

"The obligations or duties on the part of the employer, as deduced in the foreign law, are principally these: (1) To pay the price or compensation; (2) To pay for all proper new and accessorial materials; (3) To do everything on his part to enable the workman to execute his engagement; (4) And, finally, to accept the thing when it is finished. But care is to be taken that the materials are not extravagant, and that the claims are not beyond the fair scope of the engagement. Besides these duties, the employer is bound to good faith and honesty in his conduct. He must not conceal defects, or practise fraud upon the other party; and he must conform to all the special stipulations contained in his contract. These duties are formally treated of by Pothier, and they seem so clear, upon principles of general justice, that the common law could hardly be deemed a rational science if it did not recognize them" (Story, s. 425).

"A person who employs another by the piece or by the job, or who lets out task work to be done for an express or implied remuneration, is, in general, bound to do everything that is necessary to be done on his part to enable the hirer of the work to execute his engagement, and earn the hire or reward. He impliedly undertakes to resort to no misrepresentation or concealment calculated to mislead the servant or undertaker of the work and give him a false estimate of the nature and extent of it, to accept the work when completed, and to pay the customary hire, in case no specific rate of remuneration has been agreed upon. When there is an absolute and unqualified refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the engagement, the undertaker of the work has a right, if he has done anything under the contract, to sue immediately, for remuneration on a *quantum meruit* if the contract is defeasible, or, if not, for compensation for the damage he has sustained in being prevented from earning the stipulated hire' (Addison on Contracts, 7th edit., p. 662).

Right of Employer to Stop Services.

The bankrupt, Bennett, was a calico-printer, the defendants, Barnsley and another, were machine-engravers. The bankrupt employed the defendants to engrave six patterns for him, each requiring to be engraved on three rollers; for three of the patterns it was agreed that the bankrupt should pay 5*l.* each, for the other three 6*l.* each—the bankrupt furnishing the drawings and the rollers. The drawings and fifteen of the rollers were accordingly furnished by the bankrupt.

"I agree with the plaintiff's counsel, that the bankrupt had a right at any time to stop the progress of the work which he had ordered to be done upon his rollers, and that he was entitled to reclaim his chattels without being compelled to tender the full amount which he was to have paid for the entire work. But, on the other hand, I have no manner of doubt that before he can require the delivery of his chattels, he must at all events pay for the work which has actually been performed on them" (*Lilley* v. *Barnsley* (1844), 2 Moo. & Rob. 548, at pp. 550, 551: *Rolfe*, B.).

SECTION IV.

EMPLOYEE'S RIGHTS, DUTY AND RESPONSIBILITY.

I find in Webster's Dictionary a note that the word "employee," though perfectly conformable to analogy, and therefore perfectly legitimate, is not sanctioned by the usage of good writers. However it is, I think, sanctioned now not only by *general* use, but also by judicial use. See by Lord *Russell*, C.J., in *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44, at p. 47, and by A. L. *Smith*, L.J., in *Lowth* v. *Ibbotson*, [1899] 1 Q. B. 1003, at p. 1004.

A duty arises on the employee's part upon the receipt by him of the goods, to deal with them according to the order previously given by the employer and assented to; and the law infers an implied promise by the employee to perform such duty.

"Whenever, as in this case, an order is given previously to the delivery of goods to a carrier or other bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty" (*Streeter* v. *Horlock* (1822), 1 Bing. 34, at p. 36: *Park*, J.). (2)

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(2) The plaintiffs, living at Southampton, having purchased goods in Montreal, directed them to be forwarded to Kingston, to the care of the schooner *Regina*. They were so sent in one of the mail steamers, but the captain of the *Regina* being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by rail to Sarnia, where he would take them up on his way to Southampton. Defendants, however, shipped them from Kingston by a propeller, which was burned, with the goods on board, in the river St. Clair. They had been insured to go by the *Regina*, but having been shipped on a different vessel the policy was cancelled:—*Held* (*Richards*, C.J., dissenting), that the defendants were not liable in trover, the delivery to the propeller instead of the mail steamer not being a conversion; and that on a special count on the contract, for not sending as directed, only nominal damages could be recovered, the loss by fire being too remote (*Wallace et al* v. *Swift et al*, 28 U. C. Q. B. 563):—*Held*, reversing judgment, that defendants were liable on the contract for the value of the goods (*Wallace* v. *Swift*, 31 U. C. Q. B. 523).

A draft of the Bank of Upper Canada, dated 9th July, 1866, was sent to defendant for 242 dollars on the branch at Hamilton, in favour of the defendant, being plaintiff's apportionment of grammar school funds for the six previous months. The draft remained in defendant's possession from July 11th to September 26th, when it was transmitted by him to the plaintiffs,

Reasonable Skill, Care and Diligence required of Employee.

"If Titius deliver silk or velvet to a tailor for a suit of clothes, or a gem to a jeweller to be set or engraved, or timber to a carpenter for the rafters of his house, the tailor, the engraver, and the builder, are not only obliged to perform their several undertakings in a workmanly manner, but *since they are entitled to a reward*, either by express bargain or by implication, they must also take *ordinary* care of the things respectively bailed to them" (Jones, p. 91).

"A *workman* for *hire* must answer for *ordinary* neglect of the goods bailed, and apply *a degree of skill equal to his understanding*" (Jones, p. 121). See *ante*, p. 17, as to the phrase "ordinary neglect."

"Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a *due application of the necessary art*: it is his own fault if he undertake a work above his strength" (Jones, p. 99).

"What, then, is the degree of care or diligence for which bailees of work for hire are responsible? The general rule is (as has been often observed) that where the contract is of mutual benefit, there ordinary diligence only is required. And this is the degree of diligence, therefore, which applies to contracts of this sort, as well by the common law as by the Roman and foreign law. (3) Thus, a watchmaker having a watch left with him for repairs, is obliged to use ordinary diligence in keeping it; and if he omits it, and the watch is lost, he is liable for the value in damages" (Story, s. 429).

"The degree of skill and diligence which is required rises also in proportion to the value, the delicacy, and the difficulty of the operation" (Story, s. 432). See *ante*, p. 12, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect.

"But in all these cases, where skill is required, it is to be understood, that it means ordinary skill in the particular business or employment which the bailee undertakes, or in which he is engaged. For he is not presumed to engage for extraordinary skill, which may belong to a few men only in his business or employment, or for extraordinary personal endowments or acquirements. Reasonable skill constitutes the measure of the engagement of the workman in regard to the thing undertaken" (Story, s. 433).

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they having called for the amount on September 25th. The bank failed on September 15th:—*Held*, that an action for this money would lie against defendant as treasurer of the county, it having been paid to his agents at Toronto, and he having admitted its receipt for the special purpose (*School Trustee* v. *Farrell*, 27 U. C. Q. B. 321).

(3) Reasonable care and diligence is implied on the part of a bailee for reward (see *Hall* v. *Moss*, 25 U. C. Q. B. 263, *ante*, p. 56).

"Where skill, as well as care, is required in performing the undertaking, there, if the party purports to have skill in the business, and he undertakes for hire, he is bound, not only to ordinary care and diligence in securing and preserving the thing, but also to the exercise of due and ordinary skill in the employment of his art or business about it; or, in other words, he undertakes to perform it in a workmanlike manner. In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill, adequate to the due performance of his undertaking. And if he has not the proper skill, or if, having it, he omits to use it, or if he omits in other respects the proper degree of diligence and attention required for the work, he will be responsible for the damages sustained thereby by his employer. The general maxim is: "*Spondet peritiam artis. Imperitia culpæ adnumeratur.*" It is the party's own fault, if he undertakes without having sufficient skill, or if he applies less than the occasion requires" (Story, s. 431).

Employee's Unskilfulness known to Employer.

"I conceive, however, that, where a bailor has not been deluded by any but himself, and voluntarily employs in one art a man who openly exercises another, his folly has no claim to indulgence; and that, unless the bailee make false pretensions, or a *special* undertaking, no more can fairly be demanded of him than the best of his ability" (Jones, p. 99).

"But even where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it; there, if the bailor, with full notice, trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he possesses, or of the judgment which he can employ; and if any loss ensues from his want of due skill, he is not chargeable" (Story, s. 435).

"The employer himself is bound to exercise ordinary caution and discrimination in the choice and selection of the party he employs. If he selects a common quack or an unauthorised practitioner, the latter is responsible only for a reasonable and *bonâ fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses; and, if he has done his best and failed, he cannot be made responsible for a want of skill; for it was the employer's own fault to trust an unlearned and unskilled person, known not to be regularly and properly qualified" (Addison on Contracts, 7th edit., at p. 680).

Employee's Duty is to take all Reasonable Precaution for Protection of the Goods delivered to him.

"When chattels or materials for work have been bailed or delivered to a workman to be repaired, made up, or dealt with by him in the way of his trade, he is bound to take all reasonable and ordinary forethought and precaution for their protection and preservation; and, if a loss has occurred from robbery, or from fire or inundation, or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men to guard against the mischief" (Addison on Contracts, 7th edit., pp. 680, 681). (4)

Having given the above text writers' views, I now proceed to give cases supporting and illustrating the principles laid down by such writers.

Employee's Duty to take Measures of Precaution.

1. The defendant was the proprietor of a dry dock into which a ship of the plaintiff's had been put to be repaired. Whilst she lay there, during a remarkably high tide, the dock-gates were burst open by the water, and she was thereby forced against another vessel, and greatly injured. When the accident happened, although in the day-time, the workmen were all absent, and there was only a watchman left to take care of the shipping in the dock. The gates might have been shored up with a sufficient number of hands.

Lord *Ellenborough* held, that it was the duty of the defendant to have had a sufficient number of men in the dock, to take measures of precaution, when the danger was approaching, and that he was clearly answerable for the effects of this deficiency (*Leck* v. *Maestaer* (1807), 1 Camp. 137, at p. 138). (5)

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(4) Defendant, who was an agent in possession of tea, after authority to sell had been determined was directed to re-ship with plaintiffs (owners). He did so, but omitted to insure, and did not advise plaintiff of shipment until after the goods had been lost:—*Held*, that defendant incurred no liability to damages for not having given the plaintiffs earlier advice so as to enable them to have insured the tea (*Maitland* v. *Tylee*, 7 U. C. C. P. 335).

(5) Where an executory contract is entered into respecting property or goods, if the subject-matter be destroyed by the act of God, or *vis major*, over which neither party has any control, and without either party's default, the parties are relieved (*McKenna* v. *McNamee*, 14 O. A. R. 339). *Cunningham* v. *Dunn*, 8 C. P. D. (Ont.) followed.

Employee's Duty to Protect Property against Depredations.

2. The defendant was a watch and chronometer maker. Plaintiff entrusted to him a chronometer or timepiece to be repaired. The defendant had in his service a person of the name of Warren, who had been well recommended to him, and always slept in his shop for the purpose of protecting the property in it. Warren stole the chronometer in question, together with some watches, of which a part belonged to the defendant, and the rest to persons who had employed him to repair them. The articles stolen were deposited in a drawer, which was affixed to the shop-board, and which was locked; but the lock of which had been forced. The defendant had, in a recess in his shop, an iron chest, in which watches belonging to himself, of the value of several thousand pounds, were locked up; and which chest had not, and could not easily have been broken open.

Dallas, C.J., was of opinion that, the defendant was bound to protect the property against depredations from those who were within the house. He had taken care of his own property, by locking up and securing it. The servant in this case had been improperly trusted; and the defendant was guilty of gross negligence in leaving him in the care of goods (*Clarke* v. *Earnshaw* (1818), Gow. 30). See also *Jobson* v. *Palmer*, [1893] 1 Ch. 71, at pp. 75, 76: *Romer*, J.

Employee's Skill—Where Implied.

3. "Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own" (*Duncan* v. *Blundell* (1820), 3 Stark. 6, at p. 7: *Bayley*, J.).

4. "When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—*Spondet peritiam artis.* Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary. It may be, that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but

sweep a crossing, to clean or mend his watch, the employer probably would be held to have incurred all risks himself" (*Harmer* v. *Cornelius* (1858), 5 C. B. (N.S.) 236, at p. 246: *Willes*, J., delivering the judgment of the court).

Employee to do Work in a Workmanlike Manner.

5. "Looking at all the cases together, it appears clear that if the work supplied turns out not to have been of a workmanlike character, which is impliedly stipulated for, the defendant may show that he was not liable to pay the agreed price" (*Cousins* v. *Paddon* (1835), 2 Cr. M. & Ros. 547, at pp. 552, 553: *Parke*, B.).

6. "*Primâ facie*, it must be taken that a workman undertakes to do his work in a workmanlike manner" (*Pearce* v. *Tucker* (1862), 3 F. & F. 136, at p. 137: *Erle*, C.J.).

Personal Skill—Death or Illness Incapacitating the Employee.

All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death, and should he become insane, or paralytic, and so incapable of performing the contract by the act of God, he is not liable personally in damages.

"This was a contract [to perform at a certain musical entertainment] for the performance of a service which could alone be undertaken by the defendant's wife. She could not depute it to any one else, as it depended on her own personal skill; and the rule which governs such cases was, I think, correctly laid down by my learned predecessor, *Pollock*, C.B., in *Hall* v. *Wright* (1859), E. B. & E. 746, who says (at p. 793): 'Now it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book [within a reasonable time], or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any

more than his executors would be if he had been prevented by death.' The learned Chief Baron was, it is true, one of the dissentient judges in that case, but the principle he enunciated appears to have been one to which the majority assented; and it clearly applies to the present case. Here an artist contracted to play the piano at a concert; but if he or she should be unable by reason of illness or other cause to perform, the performance of the contract is, upon the principle laid down, excused" (*Robinson* v. *Davison* (1871), L. R. 6 Ex. 269, at pp. 274, 275: *Kelly*, C.B.).

Employee Liable alike for Misfeasance and Nonfeasance.

"In cases of the hire of work, the hirer is liable, not only for misfeasance, but also for nonfeasance; and in this respect the contract differs from that of a mere gratuitous mandatary. The reason is, that in case of hire there is a mutuality of consideration to support the contract; and therefore the party is bound to a positive fulfilment of all its terms; whereas in cases of a gratuitous mandate, the mandatary cannot be compelled to execute his undertaking, if he has not already entered upon the execution of it" (Story, s. 436). Compare *ante*, p. 107, Chapter III.—Mandates, Section III.—(a) Non-performance or Nonfeasance, and (b) Neglect or Misfeasance.

Some other Obligations of Employee.

"There are some other obligations implied on behalf of the bailee of work on the thing. Among these, is the duty of observing good faith, and practising no fraud, deceit, or imposition on his employer, either as to the quality, or quantity, or nature of his services. He is also bound to conform to all the special stipulations, which constitute a part of the contract. When the work is done, he is bound to return the thing in good order to his employer" (Story, s. 440). As to employee's lien, see *post*, p. 253.

Accidents.

"A workman is not chargeable, if the thing perishes while in his custody, without his default, either by inevitable casualty, or by internal defect, or by superior force, or by robbery, or by any other peril, not to be guarded against by ordinary diligence; unless, indeed, he has taken such risks upon himself by a special contract" (Story, s. 437; see also *ante*, p. 27, Chapter I.—Introductory, Section IV.—Inevitable Accident). (6)

Canadian Cases.

(6) See *McKenna* v. *McNamee*, 14 O. A. R. 339, *ante*, p. 239.

Larceny.

"Whether the bailee [employee] will in such a case [of theft] be liable or not, for the loss, will depend, not upon the mere fact of theft, but upon the question whether the loss has been occasioned by the want of ordinary care, that is to say, by the ordinary negligence of the bailee" (Story, s. 430; and see also *ante*, p. 41, Chapter I.—Introductory, Section VIII.—Larceny from Bailees).

SECTION V.

THE REWARD.

(*a.*) If the person employed contracts to do a specific work for a specific sum, he can recover nothing unless the work be first completed, or it can be shown that it was the employer's fault that the work was incomplete, or that there is something to justify the conclusion that the parties entered into a fresh contract.

(*b.*) If by any default of the employer the person employed cannot proceed with the work he has the option to sue the employer for the default, or to treat the contract as rescinded and sue upon a *quantum meruit*.

(*c.*) Generally, where a person is employed for reward to do work upon a thing, whether fixed or moveable, and work his own materials into such thing, the materials become part of the thing, and generally, and in the absence of a special agreement to show a contrary intention, or some usage to the contrary, the person employed is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether, in such a case, the non-completion is because the person so employed did not choose to go on with the work, or because in consequence of an accidental loss or destruction he could not go on with it.

(*d.*) Where the person employed contracts to do a specific work for a specific sum, and the subject-matter of the work is destroyed or lost without default on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither in the absence of any express or implied warranty that the thing shall continue fit to receive the work.

The following authorities support and illustrate the above propositions:

The case of *Gillett* v. *Mawman* (1808), 1 Taun. 137, a decision by *Mansfield*, C.J., is an illustration of the custom of trade (that of a printer) showing a contrary intention.

Completion of Services before receiving Payment.

1. Plaintiff proved that he had been employed by the defendant to cure a flock of sheep and lambs, of a disease called the scab, at so much per head for the sheep and so much for the lambs. The flock consisted of 350 sheep and 147 lambs. The defendant proved that the plaintiff, at the time he undertook the task, declared that he did not expect to be paid unless he cured *all* the sheep and lambs. Proof was then given that the plaintiff had completely failed in curing at least forty out of the flock. The Lord Chief Baron told the jury that, if they believed the agreement on the part of the plaintiff to have been that he would cure all the sheep at all events, (that being an entire contract,) he would be entitled to recover nothing, if it turned out that some of the flock were not cured. The jury found that the complaint had been checked, but not entirely subdued.

"The plaintiff appears to have insisted upon recovering his demand for curing all or none. He did not distinguish between those which he had, and those he had not cured. If he went for all or none, then I think the Lord Chief Baron's direction was right" (*Bates* v. *Hudson* (1825), 6 D. & R. 3, at p. 4: *Abbott*, C.J.).

2. The plaintiffs undertook to repair and make complete three glass chandeliers for the defendant for 10*l*. The chandeliers were brought back in a few days. They had been cleaned, and some icicles and drops supplied, but they were not in a perfect state. One of the arms, which was perfect when it was taken away, was broken, and several of the spangles and icicles damaged; and in one of the chandeliers, the scroll, which had been sent damaged, was brought back in the same state. Upon this, the defendant refused to give the plaintiffs an order for the 10*l*.

"The contract between the parties was, that the plaintiffs should make the chandeliers perfect for 10*l*. The plaintiffs have not performed their part of the contract, and cannot, therefore, recover anything in this form of action [assumpsit for work and labour done, and materials found and provided, &c.]" (*Sinclair* v. *Bowles* (1829), 9 B. & C. 92, at p. 94: Lord *Tenterden*, C.J.).

3. The defendant was owner of a ship which went into Milford Haven in a damaged state, and the plaintiff was employed, and undertook, *to put her into thorough repair*. Before this was completed, a dispute arose between the parties; the plaintiff was called upon to put the vessel into a fit state to continue her voyage, but refused to do so till he was paid for the work already done, and for which this action was brought.

"I have no doubt that the plaintiff in this case was entitled to recover. In *Sinclair* v. *Bowles* (1829), 9 B. & C. 92, the contract was to do a specific work for a specific sum. There is nothing in the present case amounting to a contract to do the whole repairs and make no demand till they are completed. The plaintiff was entitled to say, that he would proceed no further with the repairs till he was paid what was already due" (*Roberts* v. *Havelock* (1832), 3 B. & Ad. 404, at p. 406: Lord *Tenterden*, C.J.).

Payment on Completion.—Destruction of Subject-matter.

4. The plaintiffs, who were engineers, contracted with the defendant to do certain works upon buildings on his premises, viz., to provide and erect a steam-engine and machinery connected with it. The works were divided into different parts, and separate prices were fixed upon each of those parts. The premises were in the occupation and under the control of the defendant, and all parts of the work were far advanced towards completion, some parts were so nearly finished that the defendant had used them for the purposes of his business; but none of the parts into which the work had been divided was absolutely complete. The works were in this state when an accidental fire broke out on the defendant's premises and destroyed the defendant's buildings and the work done upon them by the plaintiffs. The question was whether, under these circumstances, the plaintiffs were entitled to recover the whole or any part of the contract price.

"We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither . . . On the supposition that the materials had become unalterably fixed to the defendant's premises, we do not think that, under such a contract as this, the plaintiffs could recover anything unless the whole work was completed. It is quite true that materials worked

by one into the property of another become part of that property. This is equally true whether it is fixed or movable property. Bricks built into a wall become part of the house ; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship ; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404, or because in consequence of a fire he could not go on with it, as in *Menetone* v. *Athawes* (1764), 3 Burr. 1592. But, though this is the *primâ facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then : and we think that the plaintiffs in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiffs had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again, in order to fulfil their contract to complete the whole and 'put it to work for the sums above named respectively.' As it is, they are, according to the principle laid down in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, excused from completing the work; but they are not therefore entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight *pro ratâ*. On the argument, much reference was made to the civil law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle ; but they do not bind us : and we think that, on the principles of English law laid down in *Cutter* v. *Powell* (1795), 6 T. R. 320 ; *Jesse* v. *Roy* (1834), 1 C. M. & R. 316 ; *Munroe* v. *Butt* (1862), 8 E. & B. 738 ; *Sinclair* v. *Bowles* (1829), 9 B. & C. 92, and other cases, the plaintiffs, having contracted to

do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract" (*Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, at pp. 658—661 : *Blackburn*, J., delivering the judgment of the court (*Martin*, B., *Blackburn*, J., *Bramwell*, B., *Shee* and *Lush*, JJ., followed in *The Madras*, [1898] P. 90) ; see also *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673, where the employee abandoned the contract).

Fulfilment of a Contract depending on the continued Existence of a particular Specified Thing.

5. "The law is also well stated in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, at p. 833, by *Blackburn*, J. There the defendant had contracted to supply the plaintiff with a room in a music-hall on a particular occasion. Before that occasion arrived the hall was burnt down, and the defendant was held not to be liable on his contract. The existence of the room was the foundation on which both parties proceeded, and the fire, which happened through the default of neither, excused both. The learned judge says : 'There are authorities which we think establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case before breach performance becomes impossible from the perishing of the thing without default of the contractor'" (*Robinson* v. *Davison* (1871), L. R. 6 Ex. 269, at p. 275 : *Kelly*, C.B.).

Right of Action under a Special Contract.

Rules as to when an action may or may not be brought by a person who has entered into a *special contract* against the person with whom he has contracted, while the plaintiff's own side of the contract remains unperformed.

1. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the

money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." (Notes to Wms. Saund., ed. 1871, vol. i., p. 551, cited in the notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

2. "When a day is appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen *after* the thing which is the consideration of the money, or other act, is to be performed, no action can be maintained for the money, or for not doing such other act before performance." (Notes to Wms. Saund., ed. 1871, vol. i., p. 552, cited in the notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

3. "Where a covenant [or promise] goes only to *part* of the consideration on both sides, and a breach of such covenant [or promise] may be paid for in damages, it is an independent covenant [or promise], and an action may be maintained for a breach of the covenant [or promise] on the part of the defendant, without averring performance." (Notes to Wms. Saund., ed. 1871, vol. i., p. 552, cited in the notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

4. "Where the mutual covenants [or promises] go to the *whole consideration* on both sides, they are mutual conditions, and performance must be averred" (*ibid.* p. 556).

Instances where a Claim in the nature of a Quantum Meruit arises though there is a Special Contract.

1. While a special contract remains open, *i.e.* unperformed, the party whose part of it is unperformed cannot recover compensation for what he has done, until the whole is completed. (See notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

2. "It is an invariable true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has, thereupon, a right to elect to rescind it, and may, on doing so, *immediately* sue on a *quantum meruit* for anything which he has done under it previously to the rescission." (See notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

3. "The general rule being thus established, viz., that while the *special contract* remained unperformed, no action of *indebitatus*

assumpsit could be brought for anything done under it, we now come to the exceptions from that rule, and the first of them is that adverted to by Mr. J. Parke in the passage just cited ["In *some* cases, a special contract not executed may give rise to a claim in the nature of a *quantum meruit*"]. In consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth, and to recover that *quantum* of remuneration . . ." (Notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

Work Improperly done under a Special Contract.

If there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this goes to the amount of the employee's demand, leaving the defendant to his claim for negligence.

"This action is founded on a claim for meritorious service. The plaintiff is to recover *what he deserves*. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing, and there must be a verdict against him.—There was formerly considerable doubt upon this point. The late Mr Justice *Buller* thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind, a cross action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule,—that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence" (*Farnsworth* v. *Garrard* (1807), 1 Camp. 38: Lord *Ellenborough*).

"When a party engages to do certain work on certain specified terms, and in a certain specified manner,—but, in fact, does not perform the work so as to correspond with the specification—he is not, of course, entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of

the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification" (*Thornton* v. *Place* (1832), 1 Moo. & Rob. 218, at p. 219 : *Parke*, J.).

With regard to the above, the following note occurs in the notes to *Cutter* v. *Powell* in Sm. Lead. Cas., vol. ii. : "As there, perhaps, might be cases to which this (the above) rule could not be with perfect justice applied, it probably was only laid down by the learned judge with reference to such as that immediately before him."

Work only partly done under a Special Contract.

"It must further be observed that where a special contract has been only partly performed, the mere fact that, the part performance has been beneficial is not enough to render the party benefited by it liable to pay for this advantage; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done, nothwithstanding the non-performance of the special contract." (Notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

Absolute Refusal of One Party to Perform his Side of the Contract.

"The next exception to the general rule, that no action of *indebitatus assumpsit* will lie while the special contract remains unperformed, is to be found in a class of cases which establish the proposition, that when one party has absolutely refused to perform, or has incapacitated himself from performing, his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a *quantum meruit*." (Notes to *Cutter* v. *Powell*, Sm. Lead. Cas., vol. ii.)

The refusal, which is to authorise the rescission of the contract, must be an unqualified one (*ibid.*).

Employee using Superior Materials not stipulated for.

Action brought to recover 5*l.* 5*s.*, being the price of a printing press, with a wrought iron bottom. The defence was that the plaintiff agreed to furnish a press with a cast iron bottom, at the price of 4*l.* 10*s.*

Lord *Tenterden*, C.J. (in summing up) : "Although the putting in of the superior materials may have fairly enhanced the price of the press; yet, if the plaintiff has stipulated to complete it with materials

of an inferior value, but which would still have been sufficient for use, he is bound by his bargain, and cannot charge more than the stipulated price; and I am of opinion, that he cannot compel the defendant to rescind the contract by returning the press" (*Wilmot* v. *Smith* (1828), 3 Car. & P. 453, at p. 455).

Damages.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (*Hadley* v. *Baxendale* (1854), 9 Ex. 341, at p. 354: *Alderson*, B.; cited in *Portman* v. *Middleton* (1858), 4 C. B. (N.S.) 322, at pp. 328, 329: by *Crowder*, J., delivering the judgment of the court; see also *post*, Chapter XI. —Carriers, Section XVII.—Damages). (7)

SECTION VI.

POSSESSORY INTEREST OF EMPLOYEE.

"Bailees for hire of labour and services, like bailees for hire of things, have, or at least may have, a special property in the

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Canadian Cases.

(7) In *Ruthven* v. *Great Western Rail. Co.*, 18 C. P. 316, it was held that the damages which follow naturally from the breach of contract, are alone to be recovered, unless the parties contemplated a different rule, or the one in default knew there was a necessity for promptness of delivery on his part, or that there was a special purpose to which the article was to be applied, in which case special damages are recoverable (*per A. Wilson*, J.).

Defendant, a steamboat owner, agreed to carry certain wheat of the plaintiffs from Oshawa to a port in the United States, by March 17th, when, as the defendant knew, the Reciprocity Treaty would expire, and an import duty be payable there. He failed to do so, and the plaintiffs, having sent the flour afterwards, were compelled to pay a large duty which they would have escaped by getting it there before the expiration of the treaty:—*Held*, that such duty was recoverable as damages for the breach of contract, and that it was immaterial that prices rose in the States soon after the day fixed for delivery, so that the plaintiffs actually made more after paying the duty than they would have done by selling it on that day (*Gibbs et al* v. *Gildersleeve*, 26 U. C. Q. B. 471). See also *Fraser* v. *Grand Trunk Railway*, 26 U. C. Q. B. 488.

thing about which the labour and services are to be performed" (Story, s. 422a ; see also *ante*, p. 38, Chapter I.—Introductory, Section VII. — Property in Goods and Chattels, and p. 227, Hirer's Possessory Interest).

SECTION VII.

REDELIVERY.

Plaintiff bought a watch of the defendant, who was a watchmaker. The plaintiff, some time afterwards, sent it to the defendant to be cleaned and repaired. The defendant repaired it and took it back to the plaintiff and asked for payment. Plaintiff requested him to take the watch to his uncle Uriah, in Margaret Street, who would pay for the repairs. The defendant, not being able to find the uncle in Margaret Street, and acting under an error as to where he had removed, delivered the watch to another uncle of the plaintiff residing in Golden Lane, who took it and paid for the repairs. The house of the latter was shortly afterwards broken open, and the watch, with other property, was stolen.

"There can be no doubt but that the plaintiff is, by law, entitled to recover . . . The second count states, that the defendant, in consideration of certain reward, to be paid him by the plaintiff, undertook to endeavour to rectify the watch, and to redeliver it to the plaintiff within a reasonable time. The meaning is clear, namely, that the defendant would redeliver the watch, when repaired, to the plaintiff or to his agent, for a redelivery to an authorised agent is a redelivery to the principal. It has been said, however, that the original contract had been discharged by the plaintiff, and a new one substituted in its stead ; but it was, in effect, one and the same contract. The defendant was to deliver the watch to the plaintiff's uncle in Margaret Street ; and if he had delivered it to him, the plaintiff's right of action would have been answered on its merits ; but it appears that, by some mistake, the watch was delivered to another uncle of the plaintiff, who resided in another part of the town, and in whose custody it remained until it was lost. There was, therefore, no delivery, either to the plaintiff, as the principal, or to his agent : and the defendant is consequently liable for the loss" (*Wilson* v. *Powis* (1826), 11 Moore, 543, at pp. 546, 547 : *Best*, C.J.).

Measure of Damages for Detention by Employee.

"If a profit would arise from a chattel, and it is left with a tradesman for repair, and detained by him beyond the stipulated

time, the measure of damages is, *primâ facie*, the sum which would have been earned in the ordinary course of employment of the chattel in the time" (*In re Trent and Humber Co.* (1868), L. R. 4 Ch. 112, at p. 117 : Lord *Cairns*, L.C.). (8)

See also *ante*, p. 6, (c) Some Definitions of the word Bailment.

SECTION VIII.

EMPLOYEE'S LIEN.

By the general law, in the absence of any special agreement, whenever a party has, in consideration of a price or reward, expended money, work, labour, services or skill in the improvement of a chattel bailed to him, he has a lien upon it whether the employment is an entire one for a specific sum or not. (9)

1. "The principle seems to be well laid down in *Bevan* v. *Waters* (1828), Moo. & Malk. 235, at p. 236, by Lord Chief Justice *Best*, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form ; or the farrier by whose skill the animal is cured of a disease ; or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases" (*Scarfe* v. *Morgan* (1838), 4 M. & W. 270, at p. 283 : *Parke*, B.). (10)

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(8) See *Ruthven* v. *Grand Trunk Railway*, and *Gibbs* v. *Gildersleeve*, *ante*, p. 251.

(9) W. left with C. a chronometer for the purpose of its being repaired. C., after taking the chronometer to pieces, found the detent spring much rusted and sent it to Boston to have it made right. W. offered C. 22 dollars 50 cents for his work, but C. said he would not deliver the chronometer until full charges were paid, viz., 47 dollars. W. thereupon sued C. to recover possession and use of his chronometer :—*Held*, affirming the judgment of the Supreme Court of Nova Scotia, that C. had a lien until he was paid his charges (*Webber* v. *Cogswell*, 2 S. C. R. 15).

(10) "It is beyond all doubt or question that a party to an agreement for the performance of work such as that undertaken by appellant (the cutting, hauling, and delivery of wood) may stipulate for a lien on the products of his labour. And it is equally clear that, subject to the applicability of any objection based on the rule of evidence invoked by respondents, such an agreement may at common law be made orally and without writing. Further, no objection to such a stipulation being made without writing can be founded

2. "The general rule, as laid down by *Best*, C.J., in *Bevan* v. *Waters* (1828), Moo. & Malk. 235, at p. 236, and by this court in *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it" (*Jackson* v. *Cummins* (1839), 5 M. & W. 342, at p. 349: *Parke*, B.).

(See the cases of *Jacobs* v. *Latour* (1828), 2 M. & P. 201, *Judson* v. *Etheridge* (1833), 1 Cr. & M. 743, and *Forth* v. *Simpson*, (1849), 13 Q. B. 680, shewing that a livery stable keeper has no lien as a rule.) (11)

3. "The principle applicable is well stated by *Tindal*, C.J., in *Bleaden* v. *Hancock* (1829), 4 C. & P. 152, at p. 156. He says, 'This is not the case of a lien claimed by a person who has bestowed labour or expended money upon an article, and who may

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either on the Statute of Frauds or on the Chattel Mortgage Act. The Statute of Frauds does not in any of its provisions apply to agreements for liens, and the Chattel Mortgage Act is out of the question since the possession was to be retained by the appellant" (*per Strong*, J.: *Byers* v. *McMillan*, 4 Man. L. R. 76; 15 S. C. R. 194).

"The doctrine of lien originated in certain principles of the common law by which a party who was compelled to received the goods of another was entitled to retain them for his indemnity. Thus, carriers and innkeepers had by the common law a lien on the goods entrusted to their charge. The rescuer of goods from perils of the sea has, on grounds of public policy, a lien at common law for salvage. And it is a principle that when a person has bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him he has a lien on it for his charge. But here the rule appears to stop, and not to include cases wherein expense has been bestowed upon the object claimed to be retained without producing any alteration in it" (*per Harrison*, C.J.: *Gurney et al* v. *Mackey*, 37 U. C. Q. B. 324).

Quære as to a farrier's right of lien on a horse for services rendered (*Nicholls* v. *Duncan*, U. C. Q. B. 11, 332).

(11) Where a party having a lien claims that lien and something more:—*Held*, that he does not necessarily waive that lien, nor waive a tender in respect thereof, unless he intimate to the opposite party that there is no necessity for his tendering the amount of the acknowledged lien (*McBride* v. *Bailey*, 6 U. C. C. P. 523). *Scarfe* v. *Morgan* and *Jones* v. *Jackson*, distinguished.

The plaintiffs, owning a line of stages, entered into a special agreement with the defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and ascertaining that the plaintiffs intended to remove their horses to another inn he refused to let them go. The plaintiffs then brought trover:—*Held*, that the defendant had no right of lien as the plaintiffs were not guests, but employed the defendant in the character of a livery stable keeper, and under a special agreement which gave him no continuing right of possession:—*Held also*, that a conversion was sufficiently proved. *Per Robinson*, C. J.: "Where a special agreement exists there can be no lien." *Per Draper*, J.: "At common law a livery stable keeper has no right of lien" (*Dixon* v. *Dalby*, U. C. Q. B. 11, 79).

detain it till he is paid. Everybody knows that by the common law a man may detain the commodity on which he has bestowed labour or money'" (*Steadman* v. *Hockley* (1846), 15 M. & W. 553, at p. 556 : *Pollock*, C.B.). (12)

4. "Nobody can dispute the general proposition that an artizan has a lien upon the goods on which he works until he has been paid the amount due to him . . . If I felt any doubt about the case it would be dispelled by the decision of *Raitt* v. *Mitchell* (1815), 4 Camp. 146, which plainly recognises the right of an artizan to a lien on goods upon which he has expended labour. And, having regard to the case of *Franklin* v. *Hosier* (1821), 4 B. & Ald. 341, I am of opinion that the lien has been established, and that the right of the trustee [the employee's] to these chattels must depend upon the performance by him of the entire contract, and the payment of the entire price" (*Ex parte Willoughby* (1881), 16 Ch. D. 604, at pp. 610, 611, 612 : *Bacon*, C.J.). (13)

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(12) A watch was left by one Von Schoern with the plaintiff for repairs, and when called for two days afterwards was not ready, whereupon plaintiff loaned to Von Schoern a watch to be kept till the repairs were completed. The watch so loaned becoming out of repair in Von Schoern's hands, was taken by him to defendant to repair, and defendant loaned Von Schoern another to use in the meanwhile, with which Von Schoern absconded. Plaintiff, learning that his watch was at defendant's shop, demanded it, and defendant refused it, setting up a lien for repairs :—*Held*, that the loan of plaintiff's watch to Von Schoern was a mere gratuitous bailment existing during the mere pleasure of the lender, passing no special property to Von Schoern, and that defendant could not set up any lien for the repairs (*McDonald* v. *Stirskey*, 3 Russell & Chesley, N. S. 520).

A packer has a lien upon the goods packed by him for the materials used and work done in packing. The plaintiff employed one B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorised by him to collect :—*Held*, that the defendants could legally retain the goods for these charges, as well as for their freight, and that B.'s lien was not lost by delivering goods to the defendants for carriage subject to it or by accepting the charges from defendants (*Hayward* v. *Grand Trunk Railway*, 32 U. C. Q. B. 392).

An auctioneer has no lien on maps left with him for the purpose of selling land thereby—such plans not being looked upon in the same light as title deeds, which are *quasi* part of the land (*Blackburn* v. *MacDonald*, 6 U. C. C. P. 380).

(13) The plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained, and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard :—*Held*, plaintiff entitled to a lien upon the bricks in priority even to a mortgagee where mortgage covered bricks in course of manufacture (*Roberts* v. *Bank of Toronto*, 25 O. R. 194.) See also *Rogers* v. *Devitt*, 25 O. R. 84.

A lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or where there is a bargain that security shall be given the moment the work is completed. There can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired.

By taking a Security the Lien is Gone.

1. "Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and further, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions, that by taking a security the lien is gone, even with regard to the goods in his possession; and cannot accompany that special security; which determines the implied contract. It in necessary to see, upon what principle that stands. I rather think, it is not regulated by the usage of trade. It has been accounted for in this way; that the lien is gone by the effect of the intention to substitute the special contract for the implied one: the necessities of mankind requiring, that the goods should be delivered for consumption, it is not to be presumed, that the lien was to be extended through the whole period; which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have however heard that denied; and it has been put upon a rule of law, that the special contract removes the implied one" (*Cowell* v. *Simpson* (1809), 16 Ves. 275, at p. 279: *Eldon*, L.C.). (14)

A Lien is Inconsistent with Credit.

2. "A lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined

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(14) A lien for wharfage is discharged by tender (*Davison* v. *Mulcahy*, 19 N. S. L. R. 209). See also *Willis* v. *Sweet*, 20 N. S. L. R. 449. In the latter case defendant contracted with plaintiff to make and iron a sulky, for a price agreed upon. On completion of the work defendant tendered the amount agreed upon, but plaintiff refused to accept it or to deliver the carriage unless paid a larger amount which he claimed. Defendant thereupon broke open plaintiff's workshop and removed the carriage:—*Held*, that tender destroyed plaintiff's lien.

to think that he has a lien like other artificers. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired" (*Raitt* v. *Mitchell* (1815), 4 Camp. 146, at pp. 149, 150: Lord *Ellenborough*). (15)

Particular Time or Mode of Payment.

3. "We agree that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract" (*Chase* v. *Westmore* (1816), 5 M. & S. 180, at p. 186: Lord *Ellenborough*, C.J.). (16)

Destruction of Lien.

"A lien is destroyed if the party entitled to it gives up his right to the possession of the goods" (*Jacobs* v. *Latour* (1828), 5 Bing. 130, at p. 132: *Best*, C.J.). See also *post*, p. 259. (17)

Lien on Different Parcels of Goods Delivered at Different Times.

1. In *Close* v. *Waterhouse* (1802), 6 East, p. 523 n., the Court of B. R. were of opinion that the circumstance of the

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(15) "The taking of a note or bill payable at a future day for a warehouseman's charges is an abandonment of the lien, at all events before the dishonour of the bill, and plaintiff has a clear right to the possession of the goods" (*Hagarty*, J.: *Renald* v. *Walker*, 8 U. C. C. P. 37).

(16) A., having taken a portrait for B., agreed to take in payment therefor 20 dollars in cash and a cognovit for 70 dollars payable at a future date. After receipt of the 20 dollars and tender of the cognovit, and refusal of defendant to deliver the picture, the plaintiff brings *replevin*:—*Held*, that the agreement for payment as above was a waiver of the right to lien. *Per Draper*, C.J.: "The definition of the word lien is enough to show that the property in question does not belong to the defendant, for lien may be defined to be a right in one man to retain and hold something in his possession which belongs to another until certain demands of him, the holder, have been satisfied and discharged. It is neither a *jus in re* nor *jus ad rem*, and it may be waived by any act or agreement between the parties by which the right is given up" (*Dempsey* v. *Carson*, 11 U. C. C. P. 462).

(17) Continuance of possession being indispensable to the existence of lien at law, an abandonment of the property over which the right extends divests the lien (*Troop* v. *Hart*, 7 S. C. R. 512; affirming judgment of Supreme Court, Nova Scotia. See also *McMillan* v. *Byers*, 3 Man. Law Rep. 361).

"If goods sold are in the warehouse of a third party and he assents to hold them as agent for the vendee, then the possession of the warehouseman is the possession of the vendee, and all right of lien on the part of the vendor is gone" (*per Ritchie*, C.J.). When possession is lost the lien is lost (*Fiddes* v. *Henderson*, N. B. Rep. C. MS. 47).

defendants [dyers] having had different parcels of goods in their hands at one time which had been delivered at several times, did not give them a lien on the goods in question remaining in their hands for the price of dyeing such other distinct parcels as had been returned to the owner. (18)

2. "This case was argued before us last term, and stood over for our consideration, upon the single question whether a workman, having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner, at the time of its delivery to him, can, by law, detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion, upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question, for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels, and at different times" (*Chase* v. *Westmore* (1816), 5 M. & S. 180, at p. 183: Lord *Ellenborough*, C.J., delivering the judgment of the court).

3. See *In re Witt, Ex parte Sheebrook* (1876), 2 Ch. D. 489, as to the case of a packer's general lien on goods sent to him at different times.

Lien for General Balance.

The defendant, who was a printer, was employed by Stratford, before his bankruptcy, to print several numbers, not all consecutive numbers, of Dr. Hawker's Commentary on the Bible; of which he printed 8,750 copies, and delivered to Stratford 5,987, and the residue remained with him in his warehouse. The assignees applied to the defendant for the delivery of the copies remaining in his hands. The defendant refused to deliver them, insisting that he had a lien for the whole balance.

"I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of cloaths, has a lien for the whole price upon any part of

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(18) A shipowner's lien for freight extends to every part of the goods belonging to each consignee; and the consignee cannot maintain trover for a part of the goods, which have been landed, on tendering the freight thereon, though the amount due on each package of goods may be ascertained from the bill of lading (*Neill* v. *Reid*, N. B. R. 4 All. 246).

them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien" (*Blake* v. *Nicholson* (1814), 3 M. & S. 167, at p. 169: Lord *Ellenborough*, C.J.). (19)

Lien Lost by Relinquishment.—No Lien for Standage.

1. The defendant was a coachmaker, and the plaintiff sent his tilbury to him to be repaired. After the repairs had been completed, the tilbury remained, by the permission of the defendant, in his yard, and the plaintiff had frequently taken it out of the yard and returned it. At the expiration of two months the defendant refused to permit the plaintiff to take away the tilbury, unless he paid for the standage for two months, at the rate of 2*s.* per week, and also the amount of the repairs.

"The defendant, after the repairs were completed, relinquished his possession, and could not afterwards detain for the amount of the repairs. With respect to standage, there can be no legal claim for it, without an express contract between the parties, or unless the owner has left his property on the premises beyond a reasonable time, and after notice has been given to him to remove it" (*Hartley* v. *Hitchcock* (1816), 1 Stark. 408, at p. 409: Lord *Ellenborough*). (20)

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(19) R. S. O. 1897, c. 129, s. 40, provides "that any trustee under a deed settlement or will, any executor or administrator, any guardian appointed by any court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains, and trouble, as may be allowed by the court or judge." A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway, is a trustee within s. 38, and entitled to compensation and a lien until that compensation is paid (*In re Tilsonburgh*, 24 O. A. R. 378).

An auctioneer has no lien on maps left with him for the purpose of selling lands thereby. "A lien must be particular, *i.e.*, a right to retain a thing for some charge or claim arising out of, or connected with, the thing retained; or general, *i.e.*, a right to retain not only for a particular lien, but also for a general balance of accounts between the parties in respect to other dealings of the like nature" (*per Draper*, C.J.: *Blackburn* v. *Macdonald*, 6 U. C. C. P. 380).

An unliquidated claim will support a lien (*McFabridge* v. *Holstead*, 21 N. S. L. R. 325).

An unliquidated claim against shipowner for shortage cannot be set off against freight (*Allen* v. *Chisholm*, 33 U. C. Q. B. 237).

(20) Defendant, the owner of a vessel found to be unseaworthy at the commencement of her voyage, has no right to retain cargo until the owner of the cargo pays vendee's freight, the extra charges, incurred through her unseaworthiness, for bringing the vessel into port (*Chaffey* v. *Schooley*, 40 U. C. Q. B. 165 (*post*, p. 357)).

The master of a vessel has no right to a lien beyond the freight for expenses

Use of Dock during Detention for Lien.

2. "As artificers who had expended their labour and materials in repairing the ship which the plaintiffs had delivered to them to be repaired, the defendants had a lien on the ship for the amount of the sum due to them for these repairs; but we do not find any ground on which their claim can be supported to be paid for the use of their dock while they detained the ship under the lien against the will of the owners. There is no evidence of any special contract for such a payment. The defendants gave notice that they would demand 21*l.* a day for the use of their dock during the detention: but the plaintiffs denied their liability to make any such payment, and insisted on their right to have their ship immediately delivered up to them. Nor does any custom or usage appear to authorize such a claim for compensation, even supposing that a wharfinger with whom goods had been deposited, he being entitled to warehouse rent for them from the time of the deposit, might claim a continuation of the payment during the time he detains them in the exercise of right of lien till the arrears of warehouse rent due for them is paid (see *Rex* v. *Humphery* (1825), M'Cl. & Y. 173): there is no ground for a similar claim here, as there was to be no separate payment for the use of the dock while the ship was under repair, and the claim only commences from the refusal to deliver her up. The onus, therefore, is cast upon the defendants to show that, by the general law of England, an artificer who, exercising his right of lien, detains a chattel, in making or repairing which he has expended his labour and materials, has a claim against the owner for taking care of the chattel while it is so detained. But the claim appears to be quite novel; and, on principle, there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of the chattel can hardly be supposed to have promised to pay for the keeping of it while, against his will, he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from

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incurred in landing and warehousing the cargo. The right of retention by way of lien being at common law confined strictly to the amount due for freight (*Winchester* v. *Busby*, 27 N. B. R. 231; 16 S. C. R. 336).

An equitable lien does not always give the party holding it the right of possession, and a legal binding conveyance and transfer of personal property may be made so as to oust the equitable lien (*McAllister* v. *Forsyth*, N. S. R. 5 Russ. & Geld. 151; 12 S. C. R. 1; *McDonald* v. *McPherson*, 12 S. C. R. 416).

taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained: when does the debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it (*Hartley* v. *Hitchcock* (1816), 1 Stark. 408). The right of detaining goods on which there is a lien is a remedy to the party aggrieved which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it" (*British Empire Shipping Co.* v. *Somes* (1858), E. B. & E. 353, at pp. 364—366: Lord *Campbell*, C.J.).

3. "The first (point) is, whether if a person, who has a lien upon any chattel, chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession. That was the opinion of all the judges of the courts below, and I think their opinion is perfectly right" (*Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338, at p. 345: Lord *Wensleydale*). (21)

This case was followed and applied by *Stephen*, J., in *Bruce* v. *Everson* (1883), 1 C. & E. 18).

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(21) The mere fact that a warehouseman who has a lien upon goods for a certain sum for storage, claims also to hold them for an untenable claim, does not dispense with a tender of proper amount due (*Llado* v. *Morgan*, 23 U. C. C. P. 517).

Where the holder of goods detains them for different claims as to one of which he has a lien, and the other not, the owner must tender the proper amount unless the holder either expressly or by fair implication dispenses with it. *Per Hagarty*, J.: "I understand the law to be that where the holder of goods having a clear lien sets up not only that lien but also another claim against the plaintiff of an untenable character, the true owner should tender the proper amount due, or an amount reasonably sufficient therefor, unless the defendant either expressly or by fair implication gives the owner to understand that he dispenses with the tender or offer of any sum less than that which he advances as his claim" (*Kendal* v. *Fitzgerald*, 21 U. C. Q. B. 585). See also *Provincial Insurance Co.* v. *Maitland*, 7 U. C. C. P. 427; *McBride* v. *Bailey*, 6 U. C. C. P. 523; *Buffalo and Lake Huron Rail. Co.* v. *Gordon*, *post*, p. 285.

Right of Lien gives no Right of Sale.

"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods" (*Pothonier* v. *Dawson* (1816), Holt N. P. 383, at p. 385 : *Gibbs*, C.J.).

"As regards the lien which I am asked to enforce by sale, there is no question that it is in its nature a mere passive lien. It is not founded upon any stipulation in the contract, but arises simply from the usage of trade. It has been settled by numerous authorities that such a lien does not, in general, authorize a sale. . . . The authorities . . . point to the conclusion, that the right of sale cannot be raised on the mere ground of expense of retaining the chattel which is the subject of the lien. If it could, it would arise in every case of a lien on bulky goods, the retaining of which must involve warehousing expenses" (*The Thames Iron Works Co.* v. *The Patent Derrick Co.* (1860), 1 J. & H. 93, at pp. 97, 98 : Sir *W. Page Wood*, V.-C.). (22)

SECTION IX.

EXECUTION.

"The general rule of law is, that the sheriff can seize only such things as he can sell. That rule of law still remains, except so far as it has been modified by the Act of 1 & 2 Vict. c. 110 [The Judgments Act, 1838] ; but that statute does not affect the present case. If we consider the nature of a lien, and the right which it confers, it will be evident that it cannot form the subject matter of a sale. A lien is a personal right, which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods" (*Legg* v. *Evans* (1840), 6 M. & W. 36, at p. 41 : *Parke*, B.).

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(22) The defence of lien can only be pleaded when there has been no conversion of the goods (*Neville* v. *Schofield*, 2 N. B. S. C. R. 435 ; 5 N. B. S. C. R. 124.

"A lien upon lumber for the price of sawing it would not entitle the possessor of lien to sell, and if he did sell would not confer title" (*obiter dicta*, *Burns*, J., in *White* v. *Brown*, 12 U. C. Q. B. 483 ; following *Scott* v. *Newington*, 1 M. & Rob. 252).

SECTION X.

DISTRESS.

Goods *sent or delivered* by the owner to and *received* by a person exercising a *public trade or employment* to be by the latter wrought, manufactured, or *managed* in the way of his trade or employment while they are on the premises in which that public trade or employment is carried on, are privileged from distress for the benefit of trade, *e.g.*, cloth sent to a tailor, a horse to a farrier, corn to a mill, materials to a weaver, etc.

This is a principle of the highest importance to all hirers of work, labour and services. The following extracts will show that the principle has existed and been recognised for certainly close upon 300 years.

1. "It was agreed *per curium* that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier; for the law has given the privilege in respect of the trader, and not in respect of the carrier" (*Gisbourn* v. *Hurst* (1710), 1 Salk. 249, at p. 250; cited by *Park*, J., in *Thompson* v. *Mashiter* (1823), 1 Bing. 283, at pp. 285, 286).

2. "There are five sorts of things which at common law were not distrainable; . . .

"2D. Things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ . . .

"Things sent or delivered to a person exercising a trade, to be carried wrought or manufactured in the way of his trade, as a horse to a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are" (*Simpson* v. *Hartopp* (1744), Willes 512, at pp. 514, 515: *Willes*, C.J.).

3. "The principle of the exception is admirably put by Lord *Holt* in Salkeld [*Gisbourn* v. *Hurst* (1710), 1 Salk. 249, at p. 250], and

his language shows that the exception was not established for the benefit of the individual, but of trade in general; he extends it to goods to be carried, wrought, or *managed*; and are not goods placed in the hands of a factor to be managed?" (*Gilman* v. *Elton* (1821), 3 Br. & Bing. 75, at pp. 82, 83: *Park*, J.).

The term "Public Trade" explained.

"The word 'public' has been observed upon; but I cannot admit that the trade of a butcher is not a *public* trade, within the meaning of the rule laid down in the case of *Gilman* v. *Elton* (1821), 3 Br. & Bing. 75" (*Brown* v. *Shevil* (1834), 4 Nev. & Man. 277, at p. 281: Lord *Denman*, C.J.).

"Now I confess that I do not understand what is meant by a *public* trade. I can understand that the trade of a common carrier, or of an innkeeper, is in a certain sense *more* public than ordinary trades; but the trade of a *tailor* is not, in the same peculiar sense, public; for it is quite clear that a tailor is not *under any legal obligation* to take in cloth to make a coat. I am at a loss to see how you can distinguish that trade from the trade of a butcher, and say that the latter is not a public trade" (*ibid.*, at p. 283: *Patteson*, J.).

The word "Managed" explained.

"There is no case or *dictum* that the machinery by which it [the material to be worked upon] is to be manufactured is included in the privilege. The only colour for including it seems to arise from the use of the word *managed*, in *Gisbourn* v. *Hurst* (1710), 1 Salk. 249; but that appears to apply only to the management of the material in its original or wrought state, and [*qu.* not] to the machinery or engine by which it is wrought" (*Wood* v. *Clarke* (1831), 1 Cr. & J. 484, at p. 498: Lord *Lyndhurst*, C.B.).

"In *Simpson* v. *Hartopp* (1744), Willes 512, at pp. 514, 515, the word 'managed' appears to be used as synonymous with 'manufactured.' But that is too limited a sense of the expression; for the courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be, that where, in order to the exercising such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of

the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered" (*Muspratt* v. *Gregory* (1836), 1 M. & W. 633, at pp. 645, 646 : *Alderson*, B.)

The Goods must be Sent or Delivered and Received for the Purpose of having Something Done to them.

"The general principle of law undoubtedly is, that all goods found upon the premises are liable to be distrained for rent. Upon that general rule, two exceptions only are engrafted. The first is, where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner as soon as that purpose has been accomplished. Such is the case of the horse sent to the farrier to be shod : the horse is necessarily taken there for the purpose, and necessarily remains there while it is being performed. Such likewise is the case of the tailor, who, it seems, formerly received the materials from the employer, to be fashioned into garments. The cloth, or other material, was sent to the shop for the mere purpose of having work done upon it, and was to be returned in an altered shape. These remarks embrace a very considerable range of cases, in which goods are received for the purpose of having something done to them, not for the purpose of occupying the premises" (*Parsons* v. *Gingell* (1847), 4 C. B. 545, at pp. 558, 559 : *Wilde*, C.J.).

See also the judgments of Lord *Herschell*, L.C., Lord *Esher*, M.R., and *Fry*, L.J., in *Clarke* v. *Millwall Dock Co.* (1886), 17 Q. B. D. 494. (23)

How the Principle is to be Applied.

"By our law, goods entrusted to persons carrying on public trades, to be by them dealt with, wrought, or managed in the way of their trade, are exempted from distress ; and many judges have attempted to lay down a rule which should embrace all the exemptions : but no very well defined principle is to be found in any of the cases ; and in applying it we must be guided as well as we can by the specific instances which have from time to time occurred" (*Swire* v. *Leach* (1865), 18 C. B. (N.S.) 479, at p. 491 : *Erle*, C.J.).

Canadian Cases.

(23) When materials are supplied by claimant to be manufactured by execution debtor, and it is part of the agreement that the finished article is to be the property of the claimant, an execution creditor cannot claim the goods as against the claimant (*Wellbanks* v. *Heney*, 19 O. R. 549).

The Privilege is attached to the Premises for the Benefit of Trade, and extends no further.

"*Primâ facie* any goods found on the demised premises are distrainable for rent. The law for the benefit of trade makes certain exceptions; thus, implements of trade are not distrainable, if there is other sufficient distress upon the premises; this is a qualified exception. In other cases, the exemption is absolute, such as arises in the regular course of business. Thus, goods sent to persons exercising a public trade, while they are on the premises in which that public trade is carried on, are privileged from distress for the benefit of trade; such as cloth sent to a tailor, a horse to a farrier, corn to a mill. But the privilege is attached to the premises for the benefit of trade and extends no further" (*Lyons* v. *Elliott* (1876), 1 Q. B. D. 210, at p. 215: *Lush*, J.).

CHAPTER IX.

HIRE OF CUSTODY.

SECTION I.—*Agisters*—

(*a*) *Definitions*, p. 268.
(*b*) *Duty and Responsibility of Agisters*, p. 268.
(*c*) *Possessory Interest of Agisters*, p. 271.
(*d*) *Lien of Agisters*, p. 272.
(*e*) *Distress*, p. 273.
(*f*) *Reputed Ownership*, p. 273.

SECTION II.—*Warehousemen*—

(*a*) *Definitions*, p. 274.
(*b*) *Duty and Responsibility of Warehousemen*, p. 274.
(*c*) *Acknowledgment of Bailor's Title*, p. 280.
(*d*) *Distress*, p. 281.
(*e*) *Reputed Ownership*, p. 281.

SECTION III.—*Wharfingers*—

(*a*) *Definitions*, p. 282.
(*b*) *Duty and Responsibility of Wharfingers*, p. 282.
(*c*) *Acknowledgment of Bailor's Title*, p. 284.
(*d*) *Lien*, p. 285.
(*e*) *Distress*, p. 287.

This chapter, as was said *ante*, p. 233, will be devoted to the second kind of the second class of hire. "When a man demands and receives a compensation for the *bare custody* of goods in his warehouse or store-room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiæ*, . . . and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he *lets out* for pay are in truth a mental *operation*" (Jones, 96).

"*Locatio custodiæ*, or the receiving of goods on deposit for a reward for the custody thereof, which is properly the hire of care and attention about the goods. The bailee in this case may well enough be called *locator operæ*, since the care and attention which he lets out for pay are in truth principally a mental operation, although the custody generally includes some physical labour. To this class belong warehousemen, and wharfingers, and other depositaries for hire" (Story, s. 422).

"To this class [*Locatio Custodiæ*, or Deposits for Hire] belong agistors of cattle, warehousemen, forwarding merchants, and wharfingers" (Story, s. 442).

SECTION I.

AGISTERS.

(a) Definitions.

To agist means to feed, graze, or depasture.

Agistment is "where other men's cattle are taken into any ground, at a certain rate per week; so called because the cattle are suffered *agiser*, *i.e.*, to be *levant et couchant* there. Many great farms are employed for this purpose" (Wharton's Law Lexicon).

Agister or *agistor* is "one who agists or takes in cattle and horses at a certain rate" (Webster's Dictionary).

"If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them *on demand* to the owner" (2 Bl. Com. p. 451).

(b) Duty and Responsibility of Agisters.

An agister is obliged only to observe reasonable care. He does not insure, and is not answerable for the wantonness or mischief of others.

If a horse be delivered either to an agisting farmer for the purpose of depasturing in his meadows, he is answerable for the loss of the horse, if it be occasioned by the *ordinary* neglect of himself or his servants (Jones, p. 91).

"As to agistors of cattle, it has been decided that they are within the general rule. They do not insure the safety of the cattle agisted, but they are merely responsible for ordinary negligence" (Story, s. 443). (1)

As to what is ordinary negligence, see *ante*, p. 17, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect.

Canadian Cases.

(1) The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare with other horses of the defendant had access from a field in which they were at pasture:—*Held* (*Meredith*, J., dissenting), that the plaintiff had on proof of these facts given sufficient *primâ facie* evidence of negligence to cast the onus

Agister Obliged only to take Reasonable Care.

1. Action on the case against the defendant to recover damages for his negligence in losing a horse of the plaintiff. The defendant was a farmer, and had received the plaintiff's horse to agist at a stated price. It appeared that the horse had strayed out of the defendant's field, and was lost. At the time that the horse was missed, several of the defendant's horses had likewise strayed, and had been pounded. The latter were recovered, but the plaintiff's horse was finally lost.

"All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstance which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who entrusted the horse to him, had a right to expect? I shall leave it to the jury" (*Broadwater* v. *Blot* (1817), Holt N. P. 547, at pp. 548, 549: *Gibbs*, C.J.). (2)

Doctrine of Scienter.

2. "The defendant is sued as an agister of horses, and although such an agister does not insure the safety of the horses intrusted to him, he is bound to take reasonable care of them, and if they are killed through his negligence, he is liable. At the trial it was proved that he received a young horse from the plaintiff, and put it into a field of twelve or thirteen acres with a number of heifers,

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Canadian Cases.

on defendant of showing that reasonable care which an agister is bound to exercise, and a nonsuit was set aside (*Pearce* v. *Sheppard*, 24 O. R. 167).

Per Meredith, J.: "The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff, and had not been satisfied in this case."

(2) Where the evidence is as consistent either with the existence or non-existence of negligence, it is a case for the jury to decide whether there was or was not negligence (*Henderson* v. *Barnes*, 32 U. C. Q. B. 176).

Per Ferguson, J.: "There was no special contract between the parties. The contract was, as I think, the ordinary contract for the pasturage by the defendant upon his farm of the plaintiff's mare. The contract being, as I have stated, the degree of diligence required by law of the defendant was what is called and known as ordinary diligence."

well knowing that a bull in the adjoining land was in the habit of visiting these heifers, and that there was nothing to keep him out of the field. It seems clear that this bull, either because the horse happened to come between him and the heifers, or for some other reason, attacked and killed it. The first question is whether there was evidence of negligence on the part of the defendant. Now, a large body of witnesses, comprising people acquainted with marsh land, said that in their opinion it was imprudent to turn young horses among horned cattle ; and there was counter evidence for the defendant. One of his witnesses, indeed, stated that a horse was sometimes put into a field with twenty or thirty bulls and heifers, but I think he rather injured his own side. It is impossible to lay down a rule for every case. The jury must be taken to have found that there was negligence, and I am not prepared to quarrel with their finding, as I should probably have come to the same conclusion myself. (3)

"Then the second question relates to the law (settled by authorities rather than by reason), that although the owner of an animal, such as a cow, which he allows to roam about, is responsible for damage caused by its trespassing, yet that in the case of animals not of mischevious nature, he is entitled to suppose that they will not injure anyone until he has had actual knowledge to bring him to a contrary opinion. Knowledge of the fierceness of the animal, called in pleading the scienter, was long ago held to be necessary. There is a case in Dyer's Rep. 25, pl. 162, where it

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Canadian Cases.

(3) "The test is not necessarily the care which the agister may exercise as to his own animals, for they may be accustomed to a place of danger to which a strange horse would be unused, and he may choose to take risks as to his own property which would be unwarrantable as to that of another for which he is to be paid" (*Boyd*, C. : *Pearce* v. *Sheppard*, 24 O. R. 170).

"The test in general is not what any particular man does, but what men as a class would do with similar property as a class" (Beven's Law of Negligence, 462, approved by *Boyd*, C. (*supra*), as a short and accurate statement of the law). *McLean* v. *Warnock*, 10 Rettie (Court of Sess. Cas.), 1052, followed in above case.

In *McLean* v. *Warnock* it was held that the fact that the defendant did not know of the condition of the place by which the animal was killed was no excuse.

"When the plaintiff gave evidence of contract and of loss, the onus was cast upon defendant to shew that the mare was killed without any want of reasonable diligence on his part (*Ferguson*, J., *supra* (*Meredith*, J., diss.)). "If defendant could show that misfortune occurred notwithstanding reasonable diligence on his part then he would not be liable to plaintiff" (*Ferguson*, J., *supra*).

"I am of opinion that there may well be negligence in not knowing or endeavouring to know a fact or condition of things, and that the consideration of the question of negligence or not is not always confined to cases in which the parties sought to be charged did, or omitted to do, something after actual knowledge of the facts" (*Ferguson*, J., in *Pearce* v. *Sheppard*).

was so held, and in the margin of that case there are references to earlier authorities in the Year Books, and to the Book of Exodus, c. xxi. v. 29. I suppose that this law was suited to the convenience of earlier times, when cattle were left to wander about on open commons, and it was thought that the mere fact that bulls sometimes toss people was not by itself enough to make their owners liable for their acts. The question is: Does this principle oblige us to hold as a matter of law that it cannot be negligence on the part of an agister of horses to assume that bulls and cows are likely to be quiet, and to put a horse among them? I think that this proposition is a *non sequitur* upon the law as to mischievous animals. I do not say that the defendant's act would in all cases necessarily be negligence, but it is a question of fact whether he took sufficient care or not, and the doctrine of scienter, which as I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care" (*Smith* v. *Cook* (1875), 1 Q. B. D. 79, at pp. 81, 82, 83: *Blackburn*, J.).

There is no Common Law Duty of the Agister to Redeliver the Cattle or Horses.

"The common law duty of the defendant was to take care of the pigs delivered to him, in order that the plaintiff might come and take them away; but the count alleges, that the defendant, in consideration of the reward to be paid, undertook and agreed to take care of the pigs, *and to redeliver them* to the plaintiff, and the breach is that he did not redeliver them. That requires something to be done by the defendant beyond the common law duty. The obligation to redeliver arose out of the agreement alone" (*Corbett* v. *Packington* (1827), 6 B. & C. 268, at pp. 271, 272: *Bayley*, J. See also *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, at p. 59, the judgment of *Collins*, L.J.). (4)

(c) Possessory Interest of Agisters.

The agisting farmer may vindicate, in his own right, his possessory interest against any stranger or third person (2 Bl. Com., p. 453).

Canadian Cases.

(4) Plaintiff sold a pair of horses to defendant, who sent them back as not agreeing with an alleged warranty. The plaintiff gave him repeated notice to take them again, and that unless he did so she would charge him for their keep. Defendant, in answer, insisted that he had a right to return them. The plaintiff having sued upon common counts for agistment and pasturage, the jury found that the horses belonged to the defendant:—*Held*, that the plaintiff could not recover, for the mere fact of ownership would not make defendant liable, and the evidence as to his conduct, etc., tended to negative any implied request or promise to pay (*Halliday* v. *White*, 23 U. C. Q. B. 593).

An Agister may bring Trover.

"An agister, &c., a carrier, a factor, may bring trover: even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner. Here is a general bailment. It would be monstrously inconvenient if a wrongdoer could come and take things out of the possession of him who had possession under the rightful owner" (*Sutton* v. *Buck* (1810), 2 Taun. 302, at pp. 309, 310: *Chambre*, J.).

Cited by *Park*, J., in *Burton* v. *Hughes* (1824), 2 Bing. 173, at p. 176.

(d) Lien of Agisters.

An Agister has no Lien at Common Law.

Action of trover for five kine.—One Belgrave was possessed of five kine, and put them to pasturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at pasture; and afterwards Belgrave sold them to the plaintiff, and he required them of the defendant, who refused to deliver them to the plaintiff, unless he would pay for the pasturage of them for the time that they had been with him, which amounted to ten pounds. Afterwards, one Foster paying him the said ten pounds by the appointment of Belgrave, he delivered the five beasts to Foster.

Jones and *Croke*, JJ., conceived, that this denial upon demand, and delivery of them to Foster, was a conversion, and that he may not detain the cattle against him who bought them until the ten pounds be paid, but is enforced to have his action against him who put them to pasturage. And it is not like to the cases of an innkeeper or tailor; they may retain the horse or garment delivered them until they be satisfied, but not when one receives horses or kine or other cattle to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them (*Chapman* v. *Allen* (1632), Cro. Car. 271).

"The general rule, as laid down by *Best*, C.J., in *Bevan* v. *Waters* (1828), Moo. & Malk. 235, at p. 236, and by this court in *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe* v. *Morgan*; he simply takes the animal to feed it. In addition to which we

have the express authority of *Chapman* v. *Allen* (1632), Cro. Car. 271, that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible, that it might have proceeded on the more general principle, that no lien can exist in the case of agistment; and it was so understood by this court in *Judson* v. *Etheridge* (1833), 1 C. & M. 743. The analogy, also, of the case of the livery-stable keeper, who has no lien by law, furnishes an additional reason why none can exist here; for this is a case of an agistment of milch cows, and, from the very nature of the subject-matter, the owner is to have possession of them during the time of milking; which establishes that it was not intended that the agister was to have the entire possession of the thing bailed: and there is nothing to show that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property of the owner" (*Jackson* v. *Cummins* (1839), 5 M. & W. 342, at pp. 349, 350: *Parke*, B.).

Of course an agister may have a lien by special agreement.

(e) Distress.

"There is also the old case in which it is said that cattle taken in to agist are distrainable. I cannot help thinking that if it were shown that a person exercised the trade of agisting cattle, the same principle would apply as in the case of a pawnbroker" (*Miles* v. *Furber* (1873), L. R. 8 Q. B. 77, at pp. 82, 83: *Mellor*, J.).

"The law of distress by which one man's goods are made to pay for another man's debt, is not one which should be carried beyond the limits to which it has already been confined" (*ibid.*, at p. 83: *Archibald*, J.).

See also *ante*, p. 263, and The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 45, and the cases of *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457; and *Masters* v. *Green* (1888), 20 Q. B. D. 807, as to when live stock taken in by a tenant of a holding to which the Act applies (see s. 54) to be fed at a fair price may be distrained.

(f) Reputed Ownership.

See *post*, p. 335.

SECTION II.

WAREHOUSEMEN.

(a) Definitions.

A warehouse is a storehouse for goods.

A warehouseman is he that owns or keeps a warehouse. (5)

(b) Duty and Responsibility of Warehousemen.

Previous Bargain Necessary.

"A man has no right to keep my property, and charge for the standing of it, unless there was a previous bargain between him and me, or between him and some agent authorized by me" (*Buxton* v. *Baughan* (1834), 6 C. & P. 674, at p. 676: *Alderson*, B., in summing up). (6)

Canadian Cases.

(5) When wheat is left with a warehouseman by a farmer (the owner), and the sale price to be thereafter fixed, the fact that the risk of fire is to be borne by the farmer, and the wheat kept in a separate bin, is strong evidence that no sale was effected (*Isaac* v. *Andrews*, 28 U. C. C. P. 40).

The plaintiff, a farmer, left 552 bushels of barley with defendant, getting a receipt from defendant of his having received it from the plaintiff in store. The plaintiff intended to sell it to the defendant, but, as the market price was low, it was left with him. The defendant mixed it with other barley and sold it, dealing with it as his own, the plaintiff being at liberty at any time to accept the market price, or to call for the return, not of the identical barley, but of an equal quantity of the same quality, but no price was agreed upon, nor any barley returned. The defendant's premises were destroyed by fire, and it was held that defendant was liable (*Benedict* v. *Ker*, 29 U. C. C. P. 410; following *South Australian* v. *Randell*, L. R. 3 P. C. 101; *Isaac* v. *Andrews*, *supra*, distinguished).

There are two classes of persons authorised to issue warehouse receipts by s. 7 of 43 Vict. c. 22 (D.), substituted for 34 Vict. c. 5, s. 45 (D.), viz., bailees of goods and keepers of a warehouse, etc., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly, and continuously in possession of them from first to last (*Re Monteith*, 10 O. R. 529).

Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of identical in its original or an altered form, this is a transfer of property for value—it is a sale, and not a bailment. If, however, the written contract in such case stipulates, as it often does, that the property remains at the risk of the owner, it seems equally clear that in such case, the transaction ought not to be considered a sale, but only a bailment (*Clarke* v. *McClellan*, 23 O. R. 465).

(6) The legal obligation of a pond-keeper is the same as that of a warehouse-keeper; and in the absence of an agreement or general usage of trade, establishing a general lien, he has only a special lien on timber in his possession, for his reasonable charges for the care of it (*Jack* v. *Eagle*, N. B. R. 2 All. 95).

When wheat or other merchandise is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the

When the Warehouseman's Liability Commences, and when it Ends.

"The most important practical question, which arises in respect to warehousemen, is to ascertain when their liability, as such, begins and ends; or, in other words, when their duty of custody commences and finishes" (Story, s. 445). (7)

Goods were directed to the plaintiff at Stockport, and were delivered to the defendants to be carried from Stourport to Manchester; they arrived safe at Manchester on September 30th, were that evening put into the defendants' warehouse there, where (together with other goods) they were consumed by an accidental fire that night, and before any carrier came from Stockport, to whom they could be delivered.

"If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill-founded is immaterial here), is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches" (*Garside* v. *The Proprietors of the Trent Navigation* (1792), 4 T. R. 581, at p. 582: Lord *Kenyon*, C.J.).

Canadian Cases.

identical goods are so mixed up with others that they cannot be returned, and the well-understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties is really one of sale and not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods or has an option to do either, as the property in the goods has passed to the warehousemen (*Lawlor* v. *Nicol*, 12 Man. Reps. 224).

(7) *Warehouseman.*—A warehouseman receiving goods to forward, discharges his undertaking, and consequent liability by delivering them properly directed to the master of a steamer, or other vessel, on board of his vessel engaged in the carrying trade between the place at which the goods were received, and the place to which they are to be forwarded (*per Robinson*, C.J.: *Beckett* v. *Urquhart*, 1 U. C. Q. B. 188).

Where flour was delivered to the defendants, who were warehousemen and common carriers, with directions to sell such portions of it as they could during the winter and put the remainder *in transitu* for the plaintiff in the spring, and some sales having been made before the navigation opened in the spring, an accidental fire destroyed the remainder of the flour, without any default or negligence of defendants:—*Held*, that as the flour at the time of the fire was in the hands of the defendants as warehousemen, and not as common carriers, that they are not responsible for its loss (*per Robinson*, C.J.: *Ninkell* v. *McPherson et al*, 1 U C. Q. B. 318).

"The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them" (*ibid.* : *Buller*, J.).

In *Thomas* v. *Day* (1803), 4 Esp. 262, at pp. 262, 263, Lord *Ellenborough* said The whole question turned upon the single point of, When the warehouseman's liability commenced, and the agency of the carman ended? for until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment the carman's liability commenced [*qu.* ended]. It has been urged, said his lordship, that the defendant's servants offered him the use of slings. These are provided by the defendant; and he is bound to see that they are of sufficient strength, and fit for the purpose; and he should not apply his tackle, unless that could be performed which he was bound to. If the slings were necessary, the refusal of the carman, or his declining the use of them, will not exempt the warehouseman: he ought to have insisted on the carman's using them; and if he refused, he should have repudiated those goods, and refused to accept them. It appears here, that the damaged pack of linen was in the crane, and lifted from the cart: it was then in his possession; and being so, I think, in point of law, he is liable for the loss.

Care and Diligence.

A warehouseman is only obliged to exert reasonable care and diligence in taking care of the things deposited in his warehouse.

"As to warehousemen, it is also clear that they come within the general rule, and are bound only to take common or reasonable care of the commodity intrusted to their charge" (Story, s. 444).

Reasonable Diligence.

In *Cailiff* v. *Danvers* (1792), 1 Peake 155, Lord *Kenyon* said, that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse. That he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by the act of God or the king's enemies; and that the defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent.

Negligence.

The defendant was an upholsterer; the plaintiff was an officer in the army; and being about to leave London, he sent his trunk to the defendant's house for safe custody, and he was to pay him 1*s.* per week for the house-room. When the plaintiff returned, he received the trunk, but the whole of the contents had been taken out.

"To support an action of this nature (on the case), positive negligence must be proved. It has appeared in evidence in this case, that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do; and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own" (*Finucane* v. *Small* (1795), 1 Esp. 315, at p. 316: Lord *Kenyon*).

Reasonable Care.

"We take it to be established law that, by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says, 'The second sort are bailiffs, factors, and such like.' As to this sort, he says the bailee is only bound to take reasonable care; and '*the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing put it in his power to perform it.* But it is allowed in the other cases' (*i.e.*, the carrier and innkeeper) 'by reason of the necessity of the thing.' The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it" (*Searle* v. *Laverick* (1874), L. R. 9 Q. B. 122, at pp. 126, 127: *Blackburn*, J.). (8)

Canadian Cases.

(8) It was said by *Draper*, J., that, "When the bailment is of that character which is both for the benefit of the bailor and bailee and falls within the class of *locatio operis faciendi*, it is well established that an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility. We disclaim all idea that the party who sends his goods to be warehoused is to inquire into the fitness or safety of the building where they are to be received. He has a right to expect that the building will be reasonably fit for that purpose; that there shall be no gross negligence either in that respect or in protecting the goods against spoliation or destruction. But he has no right, in our opinion, to expect anything beyond ordinary and average care in the one particular more than in the other; and the question

Government as Warehousemen.

"Their lordships can see no reason to doubt that the relation in which the Government [of Queensland] stood to the appellant company, was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred. . . . It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim '*Volenti non fit injuria*' have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of his bailee" (*Brabant & Co.* v. *King*, [1895] A. C. 632, at pp. 640, 641: Lord *Watson* delivering the judgment of the judicial committee).

Liability of Warehousemen for their Employees.

Defendants were the occupiers of a bonded warehouse in Liverpool, and for the purpose of removing some barrels of flour from their warehouse, they employed a master porter who used his own tackle and brought and paid his own men. The injury to the plaintiff was occasioned by a barrel falling on him in consequence of part of the tackle of the master porter failing while it was being used by the master porter's men. The contention of the defendants was that the plaintiff's remedy was against the master porter and not against them.

"It seems to me to make no difference whether the persons whose negligence occasions the injury be servants of the defendants,

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Canadian Cases.

for the jury and on which the defendant's liability depends in law, is, whether the evidence shows a want of that ordinary and average care. The fact of the building having fallen from a defect in the foundation is not conclusive evidence against the warehouseman, for that might happen without any negligence on his part" (*Wilmot* v. *Jarvis*, 12 U. C. Q. B. 641). See also *Brown* v. *Defoe*, 21 O. A. R. 466.

paid by daily wages, or be brought to the warehouse by a person employed by the defendants. The latter frequently occurs in a large place like Liverpool, where many persons exercise the occupation of a master porter. But the law is the same in each case" (*Randelson* v. *Murray* (1838), 8 A. & E. 109, at p. 113: *Littledale*, J.). (9)

Keeping Goods in a Place not Contracted for.—Remoteness of Damage.

The action was to recover the value of certain drapery goods warehoused by the defendant for the plaintiff, which were destroyed by fire. The contract was that the goods should be deposited at the defendant's repository at Kingsland Road, but a portion of them were deposited by the defendant elsewhere, and a fire occurring, they were destroyed. The plaintiff had insured the goods, giving Kingsland Road as the place where they were deposited, and in consequence lost the benefit of the insurance.

"I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there has been a breach of contract. The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis* v. *Garrett* (1830), 6 Bing. 716, which contains very little that is not applicable to this case" (*Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510, at p. 511: *Grove*, J.).

Delivery by Warehouseman under a Forged Order.

Trover for hides.—The hides in question were lying in the warehouse of the London Dock Co. in the name of Lubbock & Co., the owners.

Canadian Cases.

(9) Plaintiff deposited goods in defendant's warehouse (which was also a bonding warehouse) with directions not to deliver them except to his order. F., for whom the goods were intended, but to whom the defendant was directed not to deliver them without payment, paid the duty at the custom-house, and obtained a permit to release the goods from the public warehouse, and then got possession of them from the defendant's clerk:—*Held*, that the defendant was liable to the plaintiff for the goods (*Gunnison* v. *Thomas*, N. B. R., Stephen's Digest, 1880, 203). See also *Wilmot* v. *Wadsworth*, *post*, p. 283.

The brokers of Lubbock & Co. sent to the latter a sale note, from which it appeared that they had sold the hides to Broadhead, a dealer in the country.

Lubbock & Co., the plaintiffs, sent an order to the London Dock Co. to deliver the hides to the order of Broadhead. It was discovered that Broadhead had not purchased any goods of the plaintiffs. The plaintiffs then directed the London Dock Co. to rehouse the goods in the name of the plaintiffs, but it appeared in the meantime the London Dock Co. had delivered the hides upon an order, purporting to have been made by Broadhead, but which turned out to be a mere forgery.

Lord *Ellenborough* was of opinion that the defendants had delivered the hides without authority, and the plaintiffs were entitled to recover (*Lubbock* v. *Inglis* (1815), 1 Stark. 104).

(c) Acknowledgment of Bailor's Title.

Trover for malt.– The plaintiff gave in evidence an order from Knight to the defendants, who were warehousemen, to hold the malt on the plaintiff's account, a written acknowledgment from the defendants that they held it on the plaintiff's account; and that he advanced 7,500*l.* to Knight, for which the malt was to be a security.

"Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him; and I should entirely overset the security of mercantile dealings, were I now to suffer them to contest his title" (10) (*Stonard* v. *Dunkin* (1810), 2 Camp. 344: Lord *Ellenborough*; cited in *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660). See also *Thorne* v. *Tilbury* (1858), 3 H. & N. 534; *Henderson and Co.* v. *Williams*, [1895] 1 Q. B. 521. See also *ante*, p. 91,

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(10) The defendants, warehousemen, holding certain grain for one M., gave him a warehouse receipt which, on September 3rd, he endorsed to the plaintiff, who had purchased the grain either from or through him. On September 5th the sheriff received a *fi. fa.* against M., under which he seized, and M. on the 22nd made a voluntary assignment in insolvency, the sheriff gave an order for the grain to the assignee. The plaintiff having brought detinue and trover against defendants, who had shipped a portion of the grain to him on October 23rd, but retained the rest:—*Held*, that he was entitled to recover; that the grain passed to the plaintiff by the sale; and there was a sufficient change of possession, and the only one that the nature of the case permitted in the fact that upon and after the sale the defendants held the grain for the plaintiff, instead of for M., who was not himself in actual possession when he sold (*Richardson* v. *Gray et al*, 29 U. C. Q. B. 360).

Chapter II.—Deposits; Section IX.—Title of Third Person to Deposit, and *post*, p. 284, Section III. — Wharfingers — (c) Acknowledgment of Bailor's Title. (11)

(d) Distress.

A Customer's Goods in a Warehouseman's Custody are not liable to Distress.

The plaintiff deposited household furniture at a depositary to be warehoused at the rate of 30*s.* a year. The defendants seized and sold the plaintiff's goods under a warrant of distress.

"When goods are received in the course of a particular trade, to be dealt with in accordance with that trade by a tenant of premises, there are cases to show that the landlord cannot distrain upon the goods. Though there are cases somewhat to the contrary, such as that of a horse and carriage at livery. Whether or not any distinction can be drawn between that case and the case of a pawnbroker, we have a later case in the same court as an authority that pledges are privileged from distress, and the same principle applies here" (*Miles* v. *Furber* (1873), L. R. 8 Q. B. 77, at p. 82: *Mellor*, J.). (12)

"The law of distress by which one man's goods are made to pay for another man's debt, is not one which should be carried beyond the limits to which it has already been confined; and I think we ought to give effect to the principle of the decision in *Swire* v. *Leach* (1865), 18 C. B. (N.S.) 479" (*ibid.* at p. 83: *Archibald*, J.). See also *post*, p. 287, Section III.—(c) Distress; *Thompson* v. *Mashiter* (1823), 1 Bing. 283).

(e) Reputed Ownership.

See *post*, p. 335.

Canadian Cases.

(11) C. & Co., carrying on business in Chicago, had certain goods warehoused at Woodstock, with M. and T. C. and Co. first endorsed the warehouse receipts to plaintiffs, and afterwards had the receipts made out in plaintiffs' name:—*Held*, the Act as to banks and banking and warehouse receipts cannot apply to a foreign banking corporation. That, as the bailees—the warehousemen—having undertaken, prior to an execution being put in by defendants, to hold the goods for the plaintiffs, the property was in the plaintiffs, and they were entitled as against defendants. Personal property has no locality and is subject to the law which governs the person of the owner (*Commercial Bank* v. *Corcoran*, 6 O. R. 527; see also *Glass* v. *Whitney*, 22 U. C. Q. B. 290).

(12) "If goods which are seized by a sheriff under an execution belong to judgment debtor, the sheriff is justified in seizing; if they belong to plaintiff under a bill of sale, the sheriff is a wrongdoer, unless he has the right to set up the *jus tertii*—the title of the assignee in insolvency" (*per Allen*, C.J.: *Harris* v. *Vail*, 1 N. B. S. C. R. 587).

SECTION III.

WHARFINGERS.

(a) Definitions.

A *Wharf* is "a broad plain place, near some creek or haven, to lay goods and wares on, that are brought to or from the water" (Wharton's Law Lexicon).

A *Wharfinger* is "he that owns or keeps a wharf" (*ibid*).

(b) Duty and Responsibility of Wharfingers.

"As to wharfingers. Upon principle, their case is not distinguishable from that of other depositaries for hire; and therefore they are responsible only for ordinary diligence" (Story, s. 451).

As to what is ordinary diligence, see *ante* p. 14, Chapter I.—Introductory, Section III.—Degrees of Care and Neglect.

Delivery should be Made with Due Care and Diligence to the Wharfinger to render him Responsible.

"A delivery of goods to a carrier or wharfinger, with due care and diligence, is sufficient to charge the purchaser; but he has a right to require, that in making this delivery due care and diligence shall be exercised by the seller. Before the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them" (*Buckman* v. *Levi* (1813), 3 Camp. 414, at pp. 415, 416: Lord *Ellenborough*). (13)

Canadian Cases.

(13) In *Towers* v. *Talbot*, 11 U. C. 614, the plaintiff landed with his goods in the night at defendant's wharf. The landing waiter of the custom house being there, sent a person employed by the defendants as a watchman against fire, to get the key of their warehouse on the wharf, and all the plaintiff's goods were put into it except a packing case for which there was no room. Next day the plaintiff got all his goods, except the case, and paid the defendants' charges. The case was lost. The plaintiff was asked by one of the defendants to go and look at a box in the town which was thought to be his, not to speak of the loss, and to furnish a list of the things contained in the case:—*Held*, that this was sufficient evidence to go to the jury to charge the defendants, and a very moderate verdict having been given, the court refused to disturb it. Lord *Ellenborough's* words in *Buckman* v. *Levi*, 3 Camp. 415, quoted with

The end of the Wharfinger's Responsibility.

"What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end. Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there: but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the

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Canadian Cases.

approval, "the goods must be booked or must be delivered to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them."

Plaintiff bought from defendants, through their agent, 1,100 barrels of flour, and received a sale note as follows: "Toronto, June 4th, 1852. Messrs. C. and W. Wadsworth. I have this day sold for your account 1,100 barrels of flour at the Humber guaranteed to inspect as No. 1 Superfine in Montreal, Boston, or New York, deliverable free on board in good order and condition at 16*s.* 9*d.* per barrel." Having made the purchase, he wrote to G. with whom the flour was stored, at Milton Mills, on the Humber, subject to the defendants' order, saying that he expected the steamer *Marion* would be at the Humber in the morning, and that he proposed shipping the flour on board her. On June 5th he wrote again to G., saying that the steamer would be ready to commence loading on the morning of the 7th, and desired him to arrange accordingly. On the 7th the defendants gave to the plaintiff their written order upon G. to deliver the flour to the plaintiff or order, and the plaintiff transmitted that order to G. with directions to ship the flour on the *Marion*, consigned to certain persons in Boston, the defendants to pay shipping charges. The flour was shipped on the 9th, but when G. received the plaintiff's notice he had immediately sent it down the river to be ready for the steamer; while waiting there in the scow there was much rain, and when the flour reached Boston it was found to be injured. The jury found that the plaintiff was entitled to 62*l.* damage, of which 50*l.* was occasioned by wet while in G.'s warehouse, and 12*l.* while in the scow:—*Held*, that the plaintiff's conduct was not such an interference as to take the flour out of the hands of the defendants or their agent from the time of leaving the mills, and to relieve them from liability for damage received while in the scow (*per Robinson*, C.J.). It was the duty of the defendants who had engaged to deliver the flour on board in good condition at their own charge, to take care that it was either not taken from the warehouse sooner than necessary or that it should be protected against injury from the weather on its way. Mr. Gamble was their agent as warehouse-keeper and carrier, and we see no ground on which it could be held that the defendants are less liable for the flour than they would have been if the warehouse was their own (*Wilmot* v. *Wadsworth*, 10 U. C. Q. B. 594).

crew at random : but the mate is such a recognized officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods, as stated by the defendant's witnesses. It has been said, that they were lost on the wharf before they were put on board ; but if they were once well delivered to the mate, the subsequent loss cannot affect the wharfinger : they are delivered into the care of the mate ; and his negligence cannot revive any responsibility on the part of the wharfinger. I think, therefore, the usage has been sufficiently proved ; that by a delivery to the mate of the ship, the wharfinger's responsibility was at an end" (*Cobban* v. *Downe* (1803), 5 Esp. 41, at p. 42 : Lord *Ellenborough*).

A Wharfinger must Deliver to one in Authority.

"A wharfinger receives goods, and he is to keep them till they are shipped ; and further, he is to see that the persons belonging to the ship do in fact ship them. . . . It is the duty of the wharfinger to see that goods sent to him go by some ship or other. It is not by his servants that they are put on board, but he is to see that they are removed by the crew of the ship. I question if the case which has been cited [*Cobban* v. *Downe* (1803), 5 Esp. 41] is not a little too narrow. But that case decides that there must be a delivery to the master or mate; and I should hope that a wharfinger never will be held to have done his duty, if he delivers to one of the crew only. He must deliver to some one in authority" (*Leigh* v. *Smith* (1825), 1 C. & P. 638, at pp. 639, 641 : *Best*, C.J.).

(c) Acknowledgment of Bailor's Title.

One Ross had contracted to sell timber to Allum. The timber was sent to defendant's wharf and he was apprised that it had been sold to Allum, who marked the whole of it. The terms of payment by Allum not having been complied with, Ross sold the timber to the plaintiff and gave a written order to the defendant to deliver it upon receiving 18*l*. 9*s*. for the cartage. The defendant, upon receiving the written order and the 18*l*. 9*s*., said, "Very well ; I will hold the timber for you." Some time afterwards he told the sawyers that the timber belonged to the plaintiff, and not to Allum, and altimately delivered to the plaintiffs a bill for wharfage, saying, "These are the only charges on your timber." The plaintiff brought trover for the timber. The defence was, that the timber belonged to Allum.

"The principle is clearly laid down in *Stonard* v. *Dunkin* (1810), 2 Camp. 344, where Lord *Ellenborough* says : 'Whatever the rule may be between buyer and seller, it is clear the defen-

dants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him;' and *Hawes* v. *Watson* (1824), 2 B. & C. 540, is decisive of the question. There the Chief Justice said, that the acknowledgment was conclusive evidence against the wharfinger. And *Holroyd*, J., concurred with him" (*Gosling* v. *Birnie* (1831), 7 Bing. 339, at p. 345: *Bosanquet*, J.).

See also *Holl* v. *Griffin* (1833), 10 Bing. 246, following *Stonard* v. *Dunkin* (1810), 2 Camp. 344; and see *ante*, p. 280, Section II.—Warehousemen—(c) Acknowledgment of Bailor's Title.

(d) Lien.

A Wharfinger has a Lien for the Balance of a General Account.

In the case of *Spears* v. *Hartly* (1800), 3 Esp. 81, "Lord *Eldon*, referring to the case of *Naylor* v. *Mangles* (1794), 1 Esp. 109, said, This point has been ruled by Lord *Kenyon*, that a wharfinger has a lien for the balance of a general account, and considered as a point completely at rest. I shall, therefore, hold it as the settled law on the subject, that he has such a lien as is claimed in the present case." (14)

Wharfinger's Lien—Goods Mistakenly Directed.

"Suppose a wharfinger to have a general authority to receive all goods directed for A. B., and that goods come to his wharf by mistake directed for A. B. It is quite clear that the real owner of the goods could not take them away without paying the charges incident to those particular goods: but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from A. B. to him" (*Richardson* v. *Goss* (1802), 3 B. & P. 119, at p. 123: Lord *Alvanley*, C.J.).

See *Moet* v. *Pickering* (1878), 8 Ch. D. 372, as to wharfingers' lien on goods with pirated trade-marks of which the wharfingers know nothing.

Canadian Cases.

(14) When railway iron had been imported from England, and then shipped from Kingston to Port Colborn subject to ocean freight, and the freight by schooner from Kingston:—*Held*, that the defendant in whose charge the iron was left at Port Colborn had a clear right to detain for the freight from Kingston of which no tender had been made, and his right was not prejudiced by having demanded the ocean freight, which had in fact been paid (*Buffalo and Lake Huron Rail. Co.* v. *Gordon*, 16 U. C. Q. B. 283).

When plaintiff's goods are placed in defendant's hands for a purpose which ultimately fails through no fault of defendant, it was *held* that the plaintiff's refusal to pay the storage charges would prevent his recovery (3 O. A. R 392; *Gauhan* v. *St. Lawrence and Ottawa Railway*, 29 U. C. C. P. 102).

If the Wharfage be not Payable at Time of Delivery there is no Lien.

"The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it. Here, however, it seems to me that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist" (*Crawshay* v. *Homfray* (1820), 4 B. and Ald., 50, at p. 53: *Best*, J.).

Cf. ante, Chapter VIII.—Hire of Work, Labour, and Services; Section VIII.—Employee's Lien, p. 253.

A Wharfinger has no Lien for Debt Contracted after Notice of Sale by Bailor.

A quantity of paper was delivered by one Hunt to the defendant, a wharfinger, to be retained in defendant's custody, and about the same period Hunt was indebted to the defendant. Shortly afterwards the plaintiff purchased the paper from Hunt, but without obtaining any delivery order from him on the defendant. Hunt, however, called on the defendant and informed him of the sale, but the paper still remained in Hunt's name on the defendant's books.

"The question here is whether the defendant can claim a lien on the paper for a debt contracted by Hunt after the defendant had notice of the sale to the plaintiff—it seems to me he cannot; it is true there was no order for delivery, but inasmuch as the sale was notified to the defendant such order was unnecessary; the notice comes to the same thing" (*Barry* v. *Longmore* (1840), 4 Perry & Dav. 344, at p. 345: *Littledale*, J. (*Williams* and *Coleridge*, JJ., and Lord *Denman*, C.J., concurring)).

Onus of Proof of Lien is on the Wharfinger.

"The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed conusant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing

special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for anything beyond the mere wharfage. An attempt has been made to draw a distinction between the claim for labourage and that for warehouse rent, but the right to either arises out of an express or implied contract" (*Holderness* v. *Collinson* (1827), 7 B. & C. 212, at p. 216: *Bayley*, J.).

Right of Sale under Lien.

Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods" (*Pothonier* v. *Dawson* (1816), Holt Rep. N. P. 383, at p. 385: *Gibbs*, C.J.).

See *ante*, Chapter VIII.—Hire of Work, Labour and Services; Section VIII., Employee's Lien, p. 262.

(e) Distress.

Goods and Chattels Delivered to a Wharfinger are Privileged from Distress.

The plaintiff consigned eleven tons and a half of whalebone to one Cleasby, of London, as his factor or agent, for sale. This whalebone was landed at Ramsay's wharf, a public waterside wharf, and was afterwards placed in Ramsay's warehouse over the wharf, for safe custody, at a weekly rent, till an opportunity should offer for selling it.

Ramsay, the wharfinger, became insolvent, and was indebted to the defendants in the sum of 200*l.* for rent in arrear, in respect of the wharf and warehouse. The defendants caused a distress to be made on Ramsay's wharf and warehouse, and among other goods seized the plaintiff's whalebone.

"The cases were all considered in *Gilman* v. *Elton* (1821), 3 Br. & Bing. 75; and the general principle laid down in that case is applicable to the present. The principle there laid down was, that certain exemptions of goods from distress were permitted, not on account of the character of the individual in whose hands the goods were deposited, but for the benefit of trade. On that general ground we now decide, and not on the ground that Ramsay was the servant or stood in the place of the factor. The instances put by Lord Coke are merely illustrative, but they apply in principle, though none of them, perhaps, in terms.

"The judgment of Lord *Holt*, and the facts of the case in *Gisbourn* v. *Hurst* (1710), 1 Salk. 249, apply closely to the present. He there lays it down, 'that goods delivered to any person exercising a public trade or employment, to be carried, wrought,

or managed, in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent;' and even with respect to a private undertaking, 'that any man undertaking for hire to carry the goods of all persons indifferently, is, as to this privilege, a common carrier, for the law has given the privilege in respect of the trader, and not in respect of the carrier'; and he refers to *Read* v. *Burley* (1597), Cro. Eliz. 596, where wool at a private beam was held to be not liable to distress. Therefore, keeping to the broad and general principle of convenience and benefit to trade and commerce, I think these goods ought not to have been distrained" (*Thompson* v. *Mashiter* (1823), 1 Bing. 283, at pp. 285, 286: *Park*, J.). See also *ante*, p. 281, (d) Distress.

CHAPTER X.

INNKEEPERS.

SECTION I.—*Definitions*, p. 289.
(*a*) *Common Law*, p. 290.
(*b*) *Statutory*, p. 293.

SECTION II.—*Innkeeper's rights, duty and responsibility at Common Law*, p. 294.

SECTION III.—*The Innkeepers' Liability Act*, 1863 (26 & 27 *Vict. c.* 41) p. 318.

SECTION IV.—*Innkeepers' Lien*, p. 322.

SECTION V.—*Innkeeper's Power of Sale. The Innkeepers Act*, 1878 (41 & 42 *Vict. c.* 38), p. 332.

SECTION VI.—*Distress*, p. 334.

SECTION VII.—*Reputed Ownership*, p. 335.

The law of innkeepers, a sub-division of Hire (see *ante*, p. 203), so far as it concerns the law of bailments, will form the subject-matter of this chapter. Now that travelling has so much increased and hotels and inns are to be found nearly everywhere, this branch of bailments should receive considerable attention. It is to be remembered that we are chiefly concerned with the custody of the guest's goods and chattels in a work on bailments. Such custody is considered as accessory to the principal contract (see *post*, p. 302).

SECTION I.

DEFINITIONS.

As to definitions in general and legal definitions in particular, see *ante*, p. 4, Chapter I.—Introductory ; Section II. (b).

An inn is a house or place where a traveller, wayfarer or passenger can get food, lodging and things he reasonably needs while on his way. (1)

Canadian Cases.

(1) R. S. O. 1897, c. 187. An Act respecting innkeepers (s. 1 (1)). Inn shall include an hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests ; and the innkeeper shall mean the keeper of any such place.

(a) Common Law Definitions.

"In the *Six Carpenters' Case* (1611), 8 Coke 146a, a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with every thing which he has occasion for whilst upon his way" (*Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, at p. 286: *Bayley*, J.).

"A person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is no way material whether he have any sign before his door or not" (Bac. Abr. Inns and Innkeepers (B.)).

Illustrations of what is—and what is not—an inn, will be found in the following judicial statements.

1. The defendant kept a house of public entertainment called the Globe Tavern and Coffee House, in Fore Street, Moorgate, where he provided lodging and entertainment for travellers and others. No stage coaches or waggons stopped there, nor were there any stables belonging to the house.

"The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travellers. We should otherwise be obliged to say, that a person who arrives at a house of public entertainment in a post-chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveller, and that the landlord who gave him the accommodation required, would be an innkeeper: and yet that if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice enquiry in each particular case. It seems to me, therefore that it would be better, both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns" (*Thompson* v. *Lacy* (1820), 3 B. & Ald. 283, at p. 285: *Abbott*, C.J.).

A Shop in which Spirits are Retailed across the Counter is not an Inn.

2. "As to the first question, whether the place in question was an inn, we must look at the facts. The defendant was the proprietor of an hotel, and if the prosecutor had been refused accommodation in the hotel the case might have been different. But he was not. The place in question, known as the Carlton, was under the same roof as the hotel, but was entirely separate from it, with a separate entrance, and appears to have been a mere shop in which spirits are retailed across a counter. The letters, too, make it plain that this was the place to which admission was claimed by the prosecutor. Such a place is not an inn within the meaning of the common-law rule. An inn is a place 'instituted for passengers and wayfaring men' (*Calye's Case* (1584), 8 Co. Rep. 32). A tavern is not within the definition. In such a place as this no one has a right to insist on being served any more than in any other shop" (*The Queen* v. *Rymer* (1877), 2 Q. B. D. 136, at pp. 139, 140: *Kelly*, C.B.).

"The principles laid down in *Burgess* v. *Clements* (1815), 4 M. & S. 306, show that the object of the law upon the subject of an innkeeper's liability, is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging" (*ibid.*, at pp. 140, 141: *Denman*, J.).

A Coffee-house is not an Inn.

3. In this case, it was insisted that a fire policy was void, as it enumerated several trades which were considered as doubly hazardous, and declared that no insurance should be valid upon premises where any of these were carried on, unless a premium should be paid in proportion. Among these trades was that of an inn-keeper. Grigsby's coffee-house, it was contended, should be considered an inn. People from the country lodged there, as in an inn.

"Grigsby's coffee-house I happen to know is like any other coffee-house in the metropolis; and I think a coffee-house is not an inn within the meaning of the policy. Horses, waggons and coaches come to an inn; there are stables and outhouses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered doubly hazardous. But the trade of a coffee-house keeper is of a very different description" (*Doe* d. *Pitt* v. *Laming* (1814), 4 Camp. 73, at p. 77: Lord *Ellenborough*).

A mere Lodging-house is not an Inn.

4. "The first resolution in *Calye's Case* (1584), 8 Co. Rep. 32, shows that the liability for the safe keeping of the property of a guest is restricted entirely to the case of an innkeeper keeping a common inn, and the way-faring traveller using the inn as a way-farer; and the judges have distinctly laid down the rule that a mere lodging-house keeper is not liable for the loss of this lodger's goods, even though they are stolen by a member of his own household; much less if they are taken by a stranger. The reason why the law makes an innkeeper liable for the loss of his guest's goods in olden times, was, that the way-faring guest has no means of knowing the neighbourhood or the characters of those he may meet with at the inn. It was therefore thought right to cast that duty on the host. Knowing that this is one of the liabilities he incurs, the innkeeper can make such charges for the entertainment of his guests as will compensate him for the risk: and it may be observed, that, unless the law cast upon him this burthen, a dishonest innkeeper might be tempted to take advantage of a wealthy traveller. None of these reasons can apply to the case of a lodging-house keeper: and the law has never been so laid down . . . . Considering that lodgers consist of persons of all classes,—the highest as well as the lowest,—one can hardly exaggerate the mischief which would ensue from holding that the lodging-house keeper was responsible for the safety of his lodger's goods. It would be impossible to lay down any definite test of this liability: each case must be left to the discretion or the caprice of the jury. The habits of a lodging-house keeper must vary according to the situation of the premises, and a variety of other circumstances. At watering-places, for instance, it would be exceedingly inconvenient if the doors were kept locked all day. So, in sea-port towns, where lodgers come suddenly and depart at short notice, the duty contended for here would be most preposterously onerous. If, on the other hand, the law is that the lodger must take care of his own goods, it only imposes upon him the same care that he is bound to take as he walks the streets. He may always secure his valuables by carrying them about with him or by placing them specially in the custody of the keeper of the house. *Calye's Case* (1584), 8 Co. Rep. 32, is *fons juris* upon this subject, and is a direct authority against the plaintiff . . . I do not think this judgment at all interferes with the liability of the lodging-house keeper where the loss of his lodger's goods has resulted from gross negligence on the part of the former: but, where a lodging-house keeper has done nothing which amounts to mis-

feasance, I know of no authority or principle upon which he can be held responsible for the mere absence of care" (*Holder* v. *Soulby* (1860), 8 C. B. (N.S.) 254, at pp. 265, 266, 267 : *Erle*, C.J.).

Hotels.

5. "An hotel-keeper by opening his house as an hotel offers it to the use of the public as such, and thereupon the common law of England imposes on him certain duties and gives him certain rights. He has no right to refuse to take into his house any one of the public who offers himself as a guest, if he has room for him in his house ; and, in return for this obligation which it imposes on him, the common law gives him a lien for his charges upon the goods of the guest which are in the house. If the innkeeper has no room in his house, then he is not bound to take in any person who offers himself as a guest" (*Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, at pp. 19, 20 : Lord *Esher*, M.R.).

6. "I think it open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England—at any rate, such a matter would be a question of fact" (*Lamond* v. *Richard*, [1897] 1 Q. B. 541, at p. 545 : Lord *Esher*, M.R.).

(b) Statutory Definitions.

Section 4 of the Innkeepers Liability Act, 1863 (26 & 27 Vict. c. 41), enacts that :

"The words and expressions herein-after contained, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows ; that is to say, the word 'inn' shall mean any hotel, inn, tavern, public house, or other place of refreshment, *the keeper of which is now by law responsible for the goods and property of his guests* ; and the word 'innkeeper' shall mean the keeper of any such place."

As the above statute uses expressions similar to those used in the Bankruptcy Acts, some of which have been judicially interpreted, it may be assumed that the courts will be guided by the course of such judicial interpretation when they are interpreting the Innkeepers' Liability Act, 1863. The following cases may, therefore, be usefully referred to :

"*Hotel.*"

"The question turns on the construction of the late Bankrupt Act [(1825) 6 Geo. IV., c. 16], which for the first time has

rendered subject to the bankrupt laws persons following the vocation of 'victuallers, keepers of inns, taverns, hotels, or coffee houses.' These words were not all intended to mean the same thing, or so many would scarcely have been employed. Nor is it necessary that we should define them all: but it is manifest that the word *hotel* is not used in the sense of the old word *hostel*, for that means what is now termed an inn; and as the word *inn* immediately precedes, it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the *French*, and rather implies a house to which people resort for lodging, than for the sort of entertainment which is to be procured only at an inn" (*Smith* v. *Scott* (1832), 9 Bing. 14, at p. 17: *Tindal*, C.J.).

"*Lodging-house Keepers*"; "*Boarding-house Keepers.*"

"It appears to me that this case is stronger than that of *Smith* v. *Scott* (1832), 9 Bing. 14. That was the case of a lodging-house keeper; this is the case of a person who takes people in to board, and makes a profit by everybody who comes to the house. I think the case comes within the meaning of the Act of Parliament [(1825) 6 Geo. IV. c. 16, s. 2]" (*Gibson* v. *King* (1842), 10 M. & W. 667, at p. 670: *Alderson*, B.; and see also *King* v. *Simmons* (1848), 1 H. L. Cas. 754).

"It is therefore settled that a keeper of a lodging-house, who also supplies board, is an hotel keeper within the Bankruptcy Act [1869]" *Ex parte Thorne, In re Jones* (1876), 3 Ch. D. 457, at pp. 458, 459: *James*, L.J.).

SECTION II.

INNKEEPER'S RIGHTS, DUTY, AND RESPONSIBILITY AT COMMON LAW.

Having determined who an innkeeper is, our next step is to determine what his duty to the travelling or way-faring public is, that is to say, his duty towards his guests. His first duty is, if he has room, to receive the guest who applies peaceably, together with his goods and chattels, and, if required so to do, upon tendering a reasonable price for his lodging and victuals.

Duty of Innkeeper to Receive Guests.

"The action [against a carrier for refusing to carry goods] is maintainable, as well as it is against an innkeeper for refusing [a] guest, or a smith on the road who refuses to shoe my horse,

being tendered satisfaction for the same" (*Jackson* v. *Rogers* (1695), Show. 554, Case 330 : *Jefferies*, C.J.).

"The duty of innkeepers extends chiefly to the entertaining and harbouring of travellers, finding them victuals and lodgings, and securing the goods and effects of their guests ; and therefore, if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king. For he, who takes upon himself a public employment, must serve the public as far as his employment goes" (Bac. Abr. Inns and Innkeepers (C.) 1).

"They [innkeepers] are bound by law to receive guests who come to their inns, and are also bound to protect the property of those guests. They have no option either to receive or reject guests ; . . . so neither can they impose unreasonable terms on them" (*Kirkman* v. *Shawcross* (1794), 6 T. R. 14, at p. 17 : Lord *Kenyon*, C.J.).

The innkeeper is bound to receive all travellers conducting themselves properly, at whatever hour of the night they may arrive.

"The law applicable to this case is this :—that an indictment lies against an innkeeper, who refuses to receive a guest, he having at the time room in his house ; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded on good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as everyone coming and conducting himself in a proper manner has a right to be received ; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers, and supplying them with what they want . . . why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received at an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive" (*Rex* v. *Ivens* (1835), 7 C. & P. 213, at pp. 219, 220 : *Coleridge*, J., in summing up).

Intending Guests should apply Peaceably.

"There is no doubt that the law is, that a person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests" (*Hawthorn* v. *Hammond* (1844), 1 C. & K. 404, at p. 407: *Parke*, B., in summing up).

What constitutes a Guest.

This will be a convenient place to consider what constitutes a guest: how long a person must stay at an inn before he acquires the character of guest, and how long he is entitled to stay there without losing his right to be treated as a guest. A traveller, wayfarer, or passenger, can certainly be a guest; but a person who sojourns at an inn—not as a traveller, wayfarer, or passenger—is not a guest.

A person who uses an inn or hotel, either for a temporary or more permanent stay, in order to take what the inn can give, may be a guest. He need not stay the night; merely getting a meal there may make him a guest. (2)

The above law is to be gathered from the authorities, in order of date, subjoined:—

Who is a Guest?

1. "If a man comes to an inn with a hamper, in which he hath several goods, and goes away, leaving this with the host, and two days after comes again, but in the time of his absence it is stolen, he shall have no action against the host; for at the time of the stealing, he was not his guest, and by the keeping of the hamper the host had no benefit, and, therefore, shall not be charged with the loss of it in his absence" (Bac. Abr. Inns and Innkeepers (C.) 5). (3)

Canadian Cases.

(2) When a traveller is shown to have come to an inn as a guest, and to have stayed there six weeks, paying for his board by the week, two days in advance:—*Held*, that if dismissed abruptly without cause, he has a right of action against the landlord on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shown to have rented a certain apartment in the inn as tenant for a certain term (*Whiting* v. *Mills*, 7 U. C. Q. B. 450).

A guest who has been received, loses the right to be entertained if he neglect or refuse to pay upon reasonable demand (*Doyle* v. *Walker*, 26 U. C. Q. B. 502).

(3) The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box in the baggage room. The plaintiff intended to take it away the day

2. "If an host invite one to supper, and the night being far spent, invites him to stay all night, if he is after robbed, yet shall not the host be charged; for this guest was no traveller": (*ibid.*).

3. "If a man upon a special agreement boards or sojourns in an inn, and is robbed, the host shall not answer for it": (*ibid.*).

The Relation of Landlord and Guest must be made out to make the Former liable as Such.

4. The plaintiff arrived about noon at the railway station at Carlisle, and was there met by one of the porters of the defendants' hotel, to whom he gave three packages, including a despatch box and a dressing bag, and asked him to take them to the hotel, which adjoined the railway station. He then intended to pass the night at the hotel, but after reading a telegram which he found waiting for him at the office, he decided to go to Manchester the same day. He went into the coffee-room to dine, but was told that there was no joint ready, and proceeded, by the waiter's advice, to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. On his way to the refreshment-room he met the porter with his luggage, and told him to lock it up till he was ready to start for Manchester. The luggage was locked up in a room adjoining the refreshment-room, but on the plaintiff's arrival at the platform, part of it was found to be missing. Upon the objection that there was no evidence that the plaintiff ever became a guest of the defendants at their inn, the learned judge (*Stephen*, J.) ordered a nonsuit. A rule was obtained to set aside the nonsuit.

"The law relating to the liability of innkeepers is fully considered in *Calye's Case* (1584) 8 Co. Rep. 32 and it is clear that

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Canadian Cases.

following, but owing to illness he did not call for it for several weeks, when it was discovered that the box was lost:—*Held*, plaintiff could not recover.

Per Hagarty, C.J.O.: "This case falls within the class of cases where the bailment of goods is for the benefit of the bailor alone, and where the bailee is responsible only for gross negligence. Liability can only arise from actual clear negligence. When the evidence taken is equally consistent with the absence as with the existence of negligence, the well known rule should apply."

"Proof of negligence is essential to the right to recover. No verdict for the plaintiff should be rested on mere surmise or guess" (*Palin* v. *Reed*, 10 O. A. R. 63).

Per Burton, J.A. "There is no case, that I am aware of, which puts the duty of a gratuitous bailee higher than this, that he is bound to take the same care of the property as a reasonably prudent and careful man may fairly be expected to take of his own" (*Lynar* v. *Mossop*, 36 U. C. R. 230).

in order to make the innkeeper liable at common law the plaintiff must have been a guest in the inn, according to the words of the Latin writ which is set out in the beginning of *Calye's Case*. Now I can find no ground for saying that the plaintiff was in any sense a guest within the defendant's inn at the time when his luggage was lost. (4) The case of *Bennett* v. *Mellor* (1793), 5 T. R. 273, has been relied on by the plaintiff as showing that it is not necessary to make the defendant liable that the guest should spend the night at the inn. But there it was expressly found that the plaintiff had come within the house and had placed his goods near his chair, so that the case is clearly distinguishable. On the other hand, the case of *R.* v. *Rymer* (1877), 2 Q. B. D. 136, is, so far as it goes, against the plaintiff. If there had been any positive proof of negligence on the part of the defendants they might possibly have been liable, but in the absence of such proof, and the relation of landlord and guest not having been made out, the action cannot be maintained" (*Strauss* v. *County Hotel Company* (1883), 12 Q. B. D. 27, at pp. 28, 29 : Lord *Coleridge*, C.J.). (4)

The Innkeeper's Duty to continue to receive a Person as a Guest exists only when and so long as such Person is a Traveller.

5. The plaintiff went to a hotel in Brighton, and went there with the intention of staying at the hotel. She was taken in and given rooms, and she stayed there for a period of ten months. It was then intimated to her that the direction wished her to leave, but this she refused to do. Then notice was given to her, requiring her to leave, and as she still refused, advantage was taken of her being out of the hotel and her things were brought down and put outside, and on her return she was refused admittance. The foundation of her action was that she was not allowed to stay on at the hotel.

"This case seems to me to be free from doubt. The principle on which this matter turns is laid down by Lord Chief Justice *Holt*

Canadian Cases.

(4) The plaintiff arrived in Toronto from Ireland, and drove from the railway station to defendant's hotel, having a portmanteau, carpet bag, etc., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, and after occupying it for about an hour, went to his friend, with whom he remained. He was furnished with a key for the door, but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. The plaintiff said he intended to return that night, but he said nothing of his intention to defendant:—*Held*, that the plaintiff was not there as a guest after he had dressed and left the inn, and that the defendant was, therefore, not liable as an innkeeper for the portmanteau (*Lynar* v. *Mossop*, 36 Q. B. 230).

in *Rex* v. *Luellin* (1700), 12 Mod. 445, and these are the words of the report, and the whole of the report: 'The defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the small-pox; and it was quashed, for not saying he was a traveller.' That decision is cited and referred to in *Reg.* v. *Rymer* (1877), 2 Q. B. D. 136, where *Kelly*, C.B., says: 'The second question is, whether the prosecutor was a traveller. I need hardly cite authorities to show that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted'—then he refers to the case of *Rex* v. *Luellin* (1700), 12 Mod. 445. Then *Denman*, J., says: 'The principles laid down in *Burgess* v. *Clements* (1815), 4 M. & S. 306, show that the object of the law upon the subject of an innkeeper's liability is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging.' That obviously is the principle on which the liability rests, and it is clear, I think, that the obligation exists only so long as the person is a traveller, and exists towards him only in so far as he is a traveller. The only alternative is that he might be entitled to call on the innkeeper to entertain him for life, subject to certain possible exceptions for making provision for other travellers at reasonable times and so forth" (*Lamond* v. *Richard*, [1897] 1 Q. B. 541, at pp. 543, 544: *Wright*, J.).

A Person using an Inn as an Inn, for the purpose merely of getting a Meal there, is a Guest.

6. The defendants were innkeepers and kept an hotel. Guests were accommodated at the hotel with sleeping-rooms if required; but from ninety to one hundred people, who were not staying at the hotel, dined in it every day. The plaintiff who lived outside the town, went to the hotel for supper at nine o'clock in the evening. He went into the dining-room and hung his overcoat upon a hook there, where coats were usually hung. He then left the room for a short time to speak to the manageress of the hotel; returned, had his supper, and, on leaving to catch a train home, found that his coat was missing.

"The real question is whether there was any evidence to justify the county court judge in finding that the plaintiff was a guest at the defendants' inn. Taking the narrower view, contended for by counsel for the defendants, of what is a guest, I fail to understand in what sense he was not a guest. The room he went into was the dining-room of the hotel. It is said that in order to make him a guest he must be a wayfarer and traveller. The facts are that he was on his way home; he was on his way to the station from

which he travelled home by railway. Why was he not a wayfarer? If he had been riding to his home on horseback along a country road, and between the *terminus à quo* and the *terminus ad quem* he used an inn for the purpose of getting food for himself and his horse, he clearly would be a wayfarer and a guest at the inn. What difference does it make that he was not riding, as one hundred years ago he probably would have been, but that he was walking to the railway station in order to take the train, and on the way called at an inn, and was received there and served with such refreshment as he required? But I do not take the more restricted view of what constitutes a guest at an inn. I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night. I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose merely of getting a meal there. There is not much to be said, upon the authorities, for the proposition that a person, in order to be a guest at the inn, must be a wayfarer or traveller. I quite agree that in olden times wayfarers were more often 'guests' than anybody else. The innkeeper's liability is said to arise because he receives persons *causâ hospitandi*. I cannot see why he receives them less *causâ hospitandi* if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and as an innkeeper, and his liability as an innkeeper thereupon attaches in respect of them. The present case is stronger than the case of the guest in *Bennett* v. *Mellor* (1793), 5 T. R. 273 . . . our decision does not touch the point which would have arisen if the place to which the plaintiff went had been a restaurant not attached to or part of the hotel. The dining-room here was used as part of the inn, and used as such a room is used. What was supplied to the plaintiff was what was supplied by the innkeeper to his guests" (*Orchard* v. *Bush & Co.*, [1898] 2 Q. B. 284, at pp. 287, 288: *Wills*, J.).

Restaurant Keeper.

The case of *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92, shows that a restaurant keeper may be liable as a bailee, though not perhaps as an innkeeper (see *The Queen* v. *Rymer* (1877), 2 Q. B. D. 136).

Guests' Washing.

Assumpsit against the defendant, the keeper of an hotel in London, for washing the linen of guests in his house, for which

it was contended that he was responsible. Lord *Ellenborough* inquired whether, when guests left such bills unpaid, the defendant had been in the habit of discharging them; if he had, an undertaking to this effect might afterwards be inferred, it might be considered as evidence of an antecedent promise.

The witness stating, that in such cases the bills were not paid at all, the plaintiff was non-suited (*Callard* v. *White* (1816), 1 Stark. 171).

Innkeeper is not bound to find his Guest with Wearing Apparel.

"The duty of an innkeeper does not extend to the finding of his guest with clothes or wearing apparel" (Bac. Abr. Inns and Innkeepers (C.) 1).

No Legal Obligation on Innkeeper to let Post Horses.

The defendant kept an inn at Hulton in Lancashire. Upon the sign over his door was written "licensed to let post horses." Plaintiff was on his road from Wigan to Manchester, and stopped at defendant's inn to change horses, and to proceed on his journey. The defendant offered to convey the plaintiff on his journey with four horses; but plaintiff would only consent to take two, which were refused.

"The declaration does not state any custom of the realm, but merely a duty. I am of opinion that there is no legal obligation on the defendant to let post chaises and horses, notwithstanding he has obtained a license for so doing" (*Dicas* v. *Hides* (1815), Holt's Rep. N. P. 207, at p. 208: *Le Blanc*, J.).

Guest's Goods and Chattels.

An innkeeper is bound to take in a guest's luggage, unless it is something exceptional in character, as well as the guest himself.

"The innkeeper is bound to receive the horses, harness, and carriage with the guest, as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest" (*Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, at p. 493: *Cotton*, L.J.).

"If a traveller comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper, by the law of the land, is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage—such as a tiger or a

package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods" (*Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, at p. 504: Lord *Esher*, M.R., see *post*, p. 322, Section IV.—Innkeepers' Lien).

Innkeeper's Care of his Guest's Goods and Chattels.

(*a.*) The innkeeper's custody of the guest's goods is considered as accessory to the principal contract, and the money paid for the apartments as extending to the care of the goods. This is analogous to the carriage of a passenger's luggage, which is carried for the sum the passenger pays for the carriage of himself (see also *post*, Chapter XI.—Carriers; Section XV.—Passenger's Luggage; (a) The Contract).

(*b.*) An innkeeper is obliged to take more than ordinary care of his guest's goods. He is *primâ facie* liable, even if the goods are stolen by his servants, by the other guests, or by strangers.

(*c.*) Where the guest's goods remain under the charge of the innkeeper and the protection of the inn, the innkeeper is an insurer of them, bound to keep them safely and securely, and is *primâ facie* liable for their loss.

The foregoing rules are gathered from the subjoined authorities, set out in chronological order:—

1. "If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit jubet*" (Bl. Com., Vol. I., p. 429).

2. "An action upon the case lies upon the common custom of the realm against a common innkeeper, if the goods of his guest are stolen or lost by the negligence of him or his servants" (Com. Dig. Action upon the case for negligence (B.) (B. 1).

Innkeeper obliged to take more than ordinary Care of Guest's Goods.

3. "Though an innholder be not paid in *money* for securing the traveller's trunk, yet the guest *facit ut faciat*, and alights at the inn, not solely for his own refreshment, but also that his goods may be safe: independently of this reasoning, the custody of the goods may be considered as *accessory* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius*, and, as great a man as

he, Lord *Holt*, seem to view the obligation; for they agree, 'that, although a bargeman and a master of a ship receive their fare for the passage of travellers, and an innkeeper his pay for the accommodation and entertainment of them, but have no pecuniary reward for the *mere custody* of the goods belonging to the passengers or guests, yet they are obliged to take *ordinary* care of those goods'" (Jones, p. 94).

Here, Sir *William Jones* says that innkeepers are obliged to take *ordinary* care, yet in the next passage cited from his work, it is clear that *more than ordinary* care is exacted from them.

Innkeepers are liable for the Goods of Guests lost at, or stolen out of the Inn, through the Negligence of the Innkeepers, or that of their Servants.

4. "It has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it* by *any person whatever*; nor shall he discharge himself from this responsibility by a refusal to take any care of the goods *because there are suspected persons in the house for whose conduct he cannot be answerable;* it is otherwise, indeed, if he refuse admission to a traveller because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent. Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests who sleep in his chambers. Rigorous as this law may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them . . . In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force* which occasioned the loss or damage was truly *irresistible*" (Jones, pp. 94, 95, 96).

5. "Innkeepers are clearly chargeable for the goods of guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable in respect of the reward, as also in respect of their being places appointed and allowed of by law, for the benefit and security of traders and travellers. And this duty and burthen enjoined innkeepers by law, they cannot discharge themselves of, under pretence of sickness, want of understanding, absence from their houses" (Bac. Abr. Inns and Innkeepers (C.) 4).

6. "The soundness of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder, can hardly admit of question; and a rule to this effect has accordingly been recognised in the jurisprudence of many countries" (Story, s. 464).

7. "By the common law innkeepers are bound to take not merely ordinary care, but *uncommon care*, of the goods, money and baggage of their guests" (Story, s. 470).

(As to what is *ordinary* care, see *ante*, p. 14, Chapter I.—Introductory; Section III.—Degrees of Care and Neglect; and as to proof of loss being *primâ facie* evidence of innkeeper's negligence, see *post*, pp. 314, 315, *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, and other cases there cited.)

Explanation of Principle of Innkeeper's Liability.

8. "The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded, is both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and such person . . . If a lady were to leave a valuable shawl in her room, the innkeeper (though unacquainted with its value) would clearly be responsible for it if lost" (*Kent* v. *Shuckard* (1831), 2 B. & Ad. 803, at p. 804: Lord *Tenterden*, C.J.).

9. "The law of England is clearly laid down in *Calye's Case* (1584), 8 Rep. 32a, which is a full comment on the writ in Fitzh. N.B.—One ingredient is, that the loss or damage arises *pro defectu hospitatoris vel servientium suorum*. When, therefore, the nature of the injury left the cause wholly doubtful, it was correct to take the opinion of the jury whether the evidence established that it was produced by a defect of such care" (*Dawson* v. *Chamney* (1843), 5 Q. B. 164, at p. 168: Lord *Denman*, C.J.). (See

remarks of *Pollock*, C.B., on this case in *Morgan* v. *Ravey* (1861), 6 H. & N. 265, at p. 277, *post*, pp. 316, 317).

10. "An innkeeper is, at common law, an insurer, and if goods of a guest are, without any negligence on the part of the guest, lost at his inn, the innkeeper is liable for their value" (*Squire* v. *Wheeler* (1867), 16 L. T. (N.S.) 93, at p. 94: *Byles*, J.).

11. "The innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller" (*Robins and Co.* v. *Gray*, [1895] 2 Q. B. 501 at p. 504: Lord *Esher*, M.R.).

Cases Illustrative of the above Principles.

Person leaving Goods at an Inn and then Absenting Himself.

1. "If one come to an inn and leave his goods and horses, and go into the town, and after returns, and in the interim his goods are stolen, no doubt but he is a guest, and shall have remedy, and so was *Sir Edwyn Sands' Case;* for his absence in part of the day is not material, but he is always reputed as a guest. So where one leaves his horse at an inn, to stand there by agreement at livery, although neither himself nor any of his servants lodge there, he is reputed a guest for that purpose, and the innkeeper hath a valuable consideration; and if that horse be stolen, he is chargeable with an action, upon the common custom of the realm. But as in the case at the bar, where he leaves goods to keep, whereof the defendant is not to have any benefit, and goes from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not a guest during that time; nor is the innkeeper chargeable as a common hostler for the goods stolen during that time, unless he make a special promise for the safe keeping of them; and the action ought to be grounded upon it" (*Gelley* v. *Clerk* (1607), Cro. Jac. 188, at p. 189: *Williams*, J.).

Innkeeper receiving Guest but refusing to keep his Goods after his Departure.

2. Plaintiff's servant took the goods in question to market at Manchester, and not being able to dispose of them went with them

to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the week following [meaning the next market day]; she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him. When he got up, after sitting there a little while, the goods were missing.

"Although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest" (*Bennett* v. *Mellor* (1793), 5 T. R. 273, at p. 275: *Ashhurst*, J.).

"In this case there was no refusal of the person; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper, (for the latter did not object to receive him,) he was in the same situation as any other guest, and entitled to the same protection for his goods" (*ibid.*, at p. 276: *Grose*, J.).

Innkeeper placing Guest's Gig in open Street.

3. Defendant was an innkeeper near Bewdley. Plaintiff drove his gig to the defendant's inn on Bewdley fair day. The plaintiff asked whether there was room for his horse, upon which the ostler of the defendant took the horse out of the gig, and put him into a stable, and the plaintiff carried his coat and whip from the gig into the house, and took some refreshment there. The ostler placed the gig outside of the inn yard, in a part of the open street, in which the defendant was in the habit of placing the carriages of his guests on fair days. The gig was stolen from thence.

"This case certainly comes very near to the distinguishing line. But, upon the best consideration, it seems to me that this gig was taken while under the protection of the innkeeper. He took in the horse; he put the guest into a room in the house; and he placed the gig where the carriages of his other guests were placed. I think, therefore, that he continued liable as innkeeper for its safe custody" (*Jones* v. *Tyler* (1834), 1 A. & E. 522, at pp. 524, 525: Lord *Denman*, C.J.).

Private Arrangement between Innkeeper and his Ostler Immaterial.

4. Defendant was the keeper of an inn in Warrington. In consequence of some street improvements, the stables which adjoined and were held with the inn, had been pulled down, and

other stables belonging to the same landlord, but which were at some little distance and quite detached from the inn, were substituted for them, without any alteration in the rent. The arrangement between the defendant and her ostler, William Rowles, was that he should make what he could out of the stables, he paying no rent for them, but providing hay and corn, etc., and supplying not only the guests in the inn but residents in the town, whose horses he was allowed to take care of.

Plaintiff arrived at the defendant's inn with his mare and gig, which were taken round, as usual at inns, to the stable yard, the plaintiff and his nephew going into the house as guests and using it as their inn. When he left the defendant's inn, the plaintiff said he should not be back till the following Monday, and requested that his mare might be properly attended to. The plaintiff did not return for a fortnight, and in the meantime, Rowles, without any order or permission from the defendant, put the mare into the gig and took her out for a drive with a friend one Sunday evening, and when passing along a road leading out of the town, the mare took fright at a locomotive engine passing under the road, became utterly unmanageable, galloped off, and occasioned the injury complained of. When taken to task for putting the mare in harness, Rowles said that she wanted exercise, that she was very spirited and more than he could manage when on her back, and so he put her in the gig.

"The first objection was, that the relation of master and servant did not exist between the defendant and Rowles, so as to make her responsible for his acts, the stables not being her stables, but his. But the plaintiff went to the defendant's inn, was there received as a guest, and his horse was taken in in the usual way, so that any private arrangement between the innkeeper and her ostler cannot be taken into consideration.

"The second objection was, that the act complained of was done without the sanction or permission of the defendant. But the defendant being an innkeeper, and having received the horse in that character, is liable for the injury done to it whilst under her care. Whether the injury was done by the innkeeper or her servant, or a stranger, is immaterial, for unless a guest conducts himself in such a manner that the loss is occasioned by his negligence, the innkeeper is liable.

"The third objection was, that the injury happened whilst giving the horse exercise which was necessary for its health. It may be that it was proper to exercise the horse, but the liability of the defendant as an innkeeper does not cease on that account" (*Day* v. *Bather* (1863), 2 H. & C. 14, at p. 18: *Pollock*, C.B.).

Guest's conduct inducing Loss.

If a guest takes exclusive possession of a room which he uses as a private showroom, a warehouse or shop, he discharges the landlord from his common law liability.

Innkeeper is not bound to find his Guests Show Rooms.

1. "The law obliges an innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely, so that in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*. And I do not say that if the goods be stolen from the inn, it is not *primâ facie* to be taken as happening through the fault of the innkeeper. But there can be no doubt also that there may be circumstances, as if the guest by his own neglect induces the loss, or introduces himself the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall not complain of the loss. Now let us first consider whether the plaintiff came to this inn *causâ hospitandi*, and secondly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping room, but we may, I think, presume that he had, apart from the travellers' room: but he desires to have a private room up some steps, in order to shew his goods. Now an innkeeper is not bound by law to find shew rooms for his guests, but only convenient lodging rooms and lodging" (*Burgess* v. *Clements* (1815), 4 M. & S. 306, at p. 310: Lord *Ellenborough*, C.J.).

Guest taking exclusive Charge of Goods.

2. Kirton came to the house of the defendant, a common innkeeper, boarded and lodged there, and applied for a private room for the purpose of depositing goods there, and exposing them for sale. The defendant showed him a small room, which Kirton approved of. Kirton took possession of it, and the key was delivered to him. Kirton had not the exclusive use of the room. A package was missed and made the subject of the present demand by Kirton's assignees in bankruptcy.

"If a guest take upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss. The only question in this case is, whether Kirton did not take upon himself the exclusive charge of his goods to the exclusion of every other person? A landlord is not bound to furnish a shop to every guest who comes

into his house ; and if a guest takes exclusive possession of a room which he uses as a warehouse or shop, he discharges the landlord from his common law liability. The question, therefore, for your consideration, is, whether, when the goods were lost, they were exclusively in Kirton's possession? It is admitted, that during part of the time Kirton kept the key, if afterwards the defendant took the key from him, the goods then ceased to be under his exclusive control, and the defendant became liable for their safe custody. The only question is whether, at the time of the loss, the goods were in the exclusive possession of Kirton?" (*Farnworth* v. *Packwood* (1816), 1 Stark. 249, at p. 250 : *Le Blanc*, J.).

Guest choosing Place in the Inn for Goods.

3. "It appears that the plaintiff went to the defendant's inn as a guest, taking certain goods with him. It was the habit of the servants of that inn to place the goods of their customers in their bed-rooms, but the plaintiff chose to have the package in question carried into the room to which travellers in general resorted. It is clear that at common law when a traveller brings goods to an inn the landlord is responsible for them. And if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bed-rooms, or some other place selected by him, he should have said so. In this respect I think that the situation of the landlord was precisely analogous to that of a carrier" (*Richmond* v. *Smith* (1828), 8 B. & C. 9, at pp. 10, 11 : Lord *Tenterden*, C.J.).

"In the case of *Burgess* v. *Clements* (1815), 4 M. & S. 306, the plaintiff asked to have a room which he used for the purposes of trade, and not merely as a guest in the inn. That was very different from the present case (*ibid.*, p. 11 : *Holroyd*, J.).

Selection of Room by Guest.

4. "I do not think a landlord is bound to provide for his guest the precise room the latter may select. Where the guest expresses a desire of sitting up all night, is the landlord bound to supply him with candle-light in a bedroom, provided he offers him another proper room for the purpose? . . . The short question is, is a landlord bound to comply with the caprice of his guests, or is he justified in saying, you shall not stay in a room in this way, and under these circumstances? I think he is not bound to do so. All that the law requires of him is, to find for

his guests reasonable and proper accommodation : if he does that, he does all that is requisite" (*Fell* v. *Knight* (1841), 8 M. & W. 269, at p. 276 : Lord *Abinger*, C.B.). (5)

Loss of Guest's Goods from his Bedroom.

5. The plaintiff brought his action to recover damages for the loss of a watch and some sovereigns, supposed to have been stolen from his bedroom in the defendant's inn, where he was a guest.

"We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain under the charge of the innkeeper, and the protection of the inn, so as to make the innkeeper *liable as for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances*" (*Cashill* v. *Wright* (1856), 6 El. & Bl. 891, at p. 900 : *Erle*, J., delivering the judgment of the court).

How far the Innkeeper's Responsibility Extends to all Parts of the Inn.

6. In the case of *Candy* v. *Spencer* (1862), 3 F. & F. 306, *Martin*, B., was of opinion that while the goods of a guest were anywhere within the inn they were under the care of the innkeeper, and he was responsible for their safe custody.

See next case.

7. "I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether any such guests may have a right, or some reasonable cause, to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so" (*Walker* v. *Midland Rail. Co.* (1886), 55 L. T. 489, at p. 490 : *The Earl of Selborne*).

Canadian Cases.

(5) An innkeeper has the sole right to select the apartment for a guest, and if he find it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change (*Doyle* v. *Walker*, 26 U. C. Q. B. 502).

Guest's Conduct rebutting Landlord's Presumed primâ facie Liability.

The presumed *primâ facie* liability of the innkeeper may be rebutted by showing absence of ordinary care on the part of the guest, the act of God or the Queen's enemies.

The guest must not take less care than a reasonable man may be reasonably expected to do under the circumstances.

Traveller Leaving Goods in Commercial Room.

1. The plaintiff's brother, who was his traveller, had for many years frequented an inn at Liverpool of which the defendant acted as mistress; he came there, whilst defendant was so acting, bringing with him a box, which he left at night in the travellers' room, as he had often done before. In the morning he found that the box had been forced open, and a parcel containing several hundred pounds in bank notes, the property of the plaintiff, had been stolen; and it was for this loss that the action was brought. It appeared on cross-examination that the box was very imperfectly secured, and that the traveller had boasted of the sum which he possessed, and had ostentatiously rolled up the notes and put them in the box in the travellers' room in the presence of several persons. There was strong ground to suspect that one of those to whom he thus showed the notes had been the thief.

"If the learned judge [*Platt*, B.] had intimated to the jury that it was the guest's duty to withdraw the property from the travellers' room and carry it with him to his bedroom, it would have been a misdirection: but such was not his direction. The learned judge reports that he finally left the question to the jury whether the guest was 'guilty of *gross negligence* in leaving the parcel in the travellers' room:' that must be taken with reference to the circumstances of the case. Can it be contended that it is impossible in point of law for a guest under any circumstances to be guilty of negligence in leaving a parcel of money in the travellers' room? Suppose a guest were to count out his money and leave it lying loose on the table of the public room; surely that might be such gross negligence as to be the cause of the loss. The facts here do not go so far as that; but there was evidence that the plaintiff's servant, in a public room, took out a large sum of money, counted it and showed it, and then left it there in a box capable of being opened without using a key. These facts might or might not amount to negligence: but they were evidence of it; and it was a fair question for the jury. We do not lay down that goods left in

the travellers' room in an inn are not in the care of the landlord, or that he is not responsible for their loss. Clearly he is *primâ facie* responsible. But there may be circumstances as to the nature and value of the property, the position of the room, or other things, which may make such conduct in the guest negligence conducing to the loss, and so rebut the landlord's *primâ facie* liability. There is no rule of law to make it so. It may in one case be gross negligence to leave property in the public room; in another it may be gross negligence to remove it thence to the guest's bedroom: each case must depend on its own circumstance" (*Armistead* v. *Wilde* (1851), 17 Q. B. 261, at pp. 263, 264: Lord *Campbell*, C.J.).

2. "I take the law to be clear that the innkeeper is *primâ facie* liable for the loss of goods in his house, though they are left in the commercial room" (*ibid.*, at p. 265: *Patteson*, J.).

3. "The learned judge reports that he left it to the jury to say whether there was '*gross*' negligence on the part of the guest. I doubt whether that direction was not too favourable to the plaintiff. I give no opinion on this point, which does not arise: but it is not to be taken that we have decided that negligence on the part of the guest conducing to the loss will not exonerate the landlord unless it amount to *crassa negligentia*" (*ibid.*, at p. 266: Lord *Campbell*, C.J.).

Negligence of Guest, Not Locking Door, coupled with other circumstances may be Evidence of his Negligence.

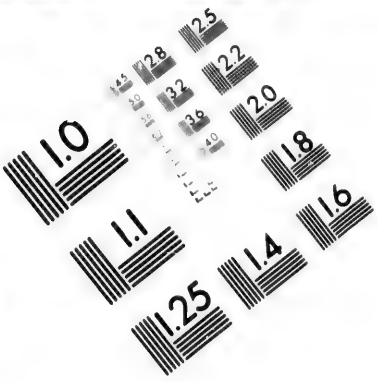
4. "The case for the plaintiff is, that the watch was stolen from him while he was a guest in the defendant's inn. If so, according to the law of England, the defendant is liable, unless you are of opinion that the plaintiff's own negligence occasioned the loss. That would not be so if he 'did all that a reasonable man might be reasonably expected to do *under the circumstances*.' Therefore it is necessary to consider all the circumstances, as that it was a London inn, where bad characters might be expected. If the plaintiff took less care than a reasonable man might be expected to take under such circumstances, the defendant is not liable; but the plaintiff is entitled to your verdict unless you think that he was guilty of a want of ordinary care. Not locking his door was not such negligence" (*Filipowski* v. *Merryweather* (1860), 2 F. & F. 285, at pp. 287, 288: *Erle*, C.J., in addressing the jury).

5. In the case of *Mitchell* v. *Woods* (1867), 16 L. T. (N.S.) 676, *Kelly*, C.B., held that there was no liability on a guest to

fasten or lock his door, and consequently it was not negligence on his part to omit to do so.

Guest's Contributory Negligence in not Locking Door.

6. "It appears that the plaintiff went to the White Lion Inn, at Bristol, an establishment of considerable size, and was received as a guest. He had with him a sum of money in a bag, of which he does not seem to have made any show. He went to bed in a room the door of which had a bolt and a lock and key. He did not, however, lock or bolt the door, and he left open a window which looked on to a balcony. He placed his trousers with the money in the pocket on a chair by his bed side, whence it might easily be abstracted by any person getting into the room whilst he was asleep. The money was stolen. The person who stole it appears to have got in at the door. Now, it is impossible to lay it down as a matter of law that it is any answer for the innkeeper to say that the guest has left his door unlocked; he is bound to keep securely the goods of his guest. When Lord *Coke* in *Calye's Case* (1584), 8 Co. Rep. 32 (a), refers to the authorities in the Year Books to show that the innkeeper is liable though the guest has a key and does not use it, all he means is that the innkeeper cannot get rid of his common law liability by giving the guest a key. But he by no means lays it down that the guest may not be guilty of negligence in abstaining from using it. For instance, if there were races in the neighbourhood which caused a great number of suspicious characters to be about the inn. Lord *Coke* goes on to say: 'But, if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for, there the fault is in the guest to have such a companion or servant; and the words of the writ are *pro defectu hospitator' seu servientium suorum*. But, if the innkeeper appoint one to lodge with him, he shall answer for him, as it there appears. The innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest, as it is held 10 Eliz. Dyer 266.' He does, therefore, intimate that the guest may by his conduct release the innkeeper from his common law obligation. He evidently means that the fact of the guest having the means of securing his door and neglecting to avail himself of them affords the innkeeper no excuse by way of plea, as matter of law. The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which



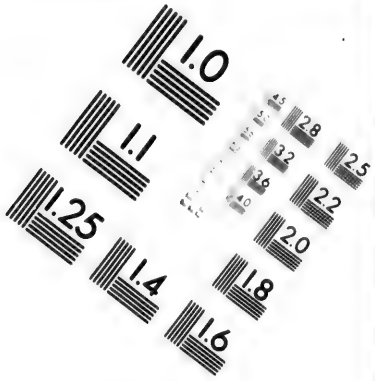
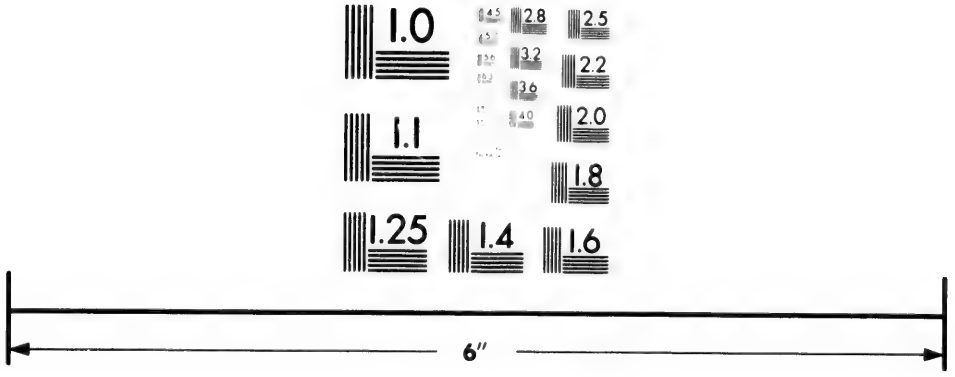
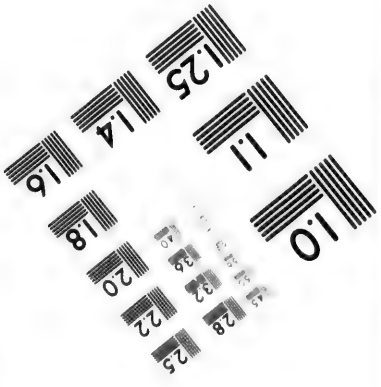


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might be urged in the innkeeper's favour. By omitting to lock his door, a jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care. All these are questions of degree when forming a judgment on the facts" (*Oppenheim* v. *White Lion Hotel Co.* (1871), L. R. 6 C. P. 515, at pp. 519, 520, 521: *Willes*, J.).

7. "What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably three hundred bedrooms are occupied by people of all sorts" (*ibid.*, at p. 522: *Montague Smith*, J.).

Leaving the Door Unlocked is Not, in itself, Evidence of Negligence unless coupled with other Circumstances.

8. "The next question will be: is leaving the door open, in itself, sufficient evidence to be left to the jury? The cases of *Oppenheim* v. *The White Lion Hotel Co.* (1871), L. R. 6 C. P. 515, and *Spice* v. *Bacon* (1877), 36 L. T. 896, do not decide that. In both these cases there was some slight evidence of negligence besides; in the former case the window opening out on to a balcony was left open after warning by the chambermaid, and in the latter case the value of the property was considerable, and the Court of Appeal held there was evidence of negligence, the Chief Baron having held that there was none. But neither of those cases go the length of saying that the mere fact of leaving the door unlocked is in itself sufficient evidence to be left to the jury; but that it is evidence coupled with other circumstances. There is no case which does go the length of saying that alone it is sufficient" *Herbert* v. *Markwell* (1882), 45 L. T. 649, at p. 651: *Grove*, J.).

9. "The law is very clear. If property is lost at an inn, the loss itself is *primâ facie* evidence against an innkeeper, unless he can relieve himself from liability either by Act of Parliament or by showing that the plaintiff did not take that reasonable care which an ordinary and prudent man would take under the circumstances" (*ibid.*: *Lopes*, J.).

Proof of Loss is primâ facie Evidence of Innkeeper's Negligence.

10. "An innkeeper is *primâ facie* liable for his guest's goods, and the proof of loss of such goods whilst at an inn is *primâ facie* evidence of negligence on the part of the innkeeper or his servants. This presumption, which the law draws adversely to the innkeeper, is capable of rebuttal, as in the case of other presumptions, and

one class of case in which it has been authoritatively held that the presumption is rebuttable is, where it is established that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances, or, in other words, has been guilty of negligence which brought about the loss. This I understand to be settled law, affirmed and reaffirmed by the following cases: *Burgess* v. *Clements* (1815), 4 M. & S. 306; *Cashill* v. *Wright* (1856), 6 E. & B. 891; *Morgan* v. *Ravey* (1861), 6 H. & N. 265: *Oppenheim* v. *White Lion Hotel Co.* (1871), L. R. 6 C. P. 515: *Jones* v. *Jackson* (1873), 29 L. T. (N.S.) 399; *Herbert* v. *Markwell* (1882), 45 L. T. 649" (*Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, at pp. 14, 15: *A. L. Smith*, J.). (6)

Guest Neglecting the Opportunity of Placing his Property under the Care of the Landlord or otherwise in Safety, constitutes Negligence on the Part of the Guest.

1. Defendant, an innkeeper, was sued in an action upon the law and custom of the realm, by the plaintiff, for a piece of cloth stolen out of the inn by some delinquents. And he for his excuse showed that he gave warning to the plaintiff that he should lay his goods in packs in a certain chamber within the inn, under a lock and key provided for that purpose, and that if he would do so he would undertake to warrant them safe, otherwise not; but he, notwithstanding the said admonition, laid them in an outer court at large, where they were stolen by the default of the plaintiff himself, etc. Upon which the plaintiff demurred in law. And the opinion of the Court was against the plaintiff (*Sanders* v. *Spencer* (1568), 3 Dyer 266*a*).

Canadian Cases.

(6) Defendant, an innkeeper, detained plaintiff's trunk for the amount owed by him for board and lodging. Plaintiff assisted in carrying his trunk to the reading room, the ordinary baggage room being full. The trunk was broken open and articles lost:—*Held*, on appeal, *per McCreight* and *Walkem*, JJ., sustaining the decision of *Drake*, J., at the trial, that the fact that plaintiff had assisted to place the trunk in the reading room, there being no evidence that he requested that it should be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care. *Per Drake*, J.: The question of innkeeper and guest did not arise, as the evidence disclosed that the relation between the parties had terminated, and that defendant held the trunk under his lien, and as such was liable to take reasonable care of the goods, in which duty he has failed. This was not an ordinary deposit by the plaintiff for safe keeping, and the fact that the trunk was broken open is evidence of negligence (*Frank* v. *Berryman*, B. C. R. (Vol. 3) 506).

2. "The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favour" (*Oppenheim* v. *White Lion Hotel Company* (1871), L. R. 6 C. P. 515, at p. 520: *Willes*, J.).

3. "I should certainly have thought that the innkeeper could not have shifted from himself his common law liability with respect to the safe custody of his customers' goods by posting such a notice as that described ['The proprietor will be happy to take charge of any valuables']. But if we look to the case last cited [*Oppenheim* v. *The White Lion Hotel Company* (1871), L. R. 6 C. P. 515], it would appear to show that where opportunity of placing property under the care of the landlord or otherwise in safety, is given, but the customer neglects to avail himself of such opportunity, this constitutes such negligence as would exonerate the innkeeper in case of loss" (*Jones* v. *Jackson* (1873), 29 L. T. (N.S.) 399: *Kelly*, C.B.).

Liability of Executors of Innkeepers.

Action against the executors of an innkeeper by a guest, whose property had been stolen during the night.

"We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier. If so, the objection that such an action would not lie against executors because it is for a tort does not arise . . . Then, being, for these reasons, of opinion that the action will lie against the executors if it would have done so against the testator, it remains to consider whether the direction to the jury was correct. We think it was. The objection was that it assumed the defendants were liable if there was no negligence in the plaintiff, and that therefore the defendants would be liable, though not only not negligent but even diligent. But we think that is the law. It is true the expression in the forms in 'tort' is, that the loss was '*propter defectum*' of the innkeeper; but we think the cases show that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God or the queen's enemies. The only case that points the other way is *Dawson* v. *Chamney* (1843), as reported 5 Q. B. 164. According to the report, however, of that case in 7 Jurist, 1037, 'there was no evidence of the manner in which the horse received the injury for which the action was brought.' This may be the explanation of that case; for though

damage happening to the horse from what occurred in the stable might be evidence of *defectus* or neglect, still, if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities" (*Morgan* v. *Ravey* (1861), 6 H. & N. 265, at pp. 276, 277: *Pollock*, C.B.).

A Paid Manager is not an Innkeeper.

Action to recover the value of certain goods of the plaintiff, stolen from him at the Clifton Arms and Pier Hotel, owned by a limited company. It was proved that the defendant was the manager of the hotel in question at a salary. The license was in her name; and her name, as well as that of the company, was painted over the front door. She managed the ordinary domestic business of the establishment. The company's name was printed on the top of the bills made out for the various customers, and all the property in the house was theirs:—*Held*, that the company were the real innkeepers, and that the action was not maintainable (*Dixon* v. *Birch* (1873), L. R. 8 Ex. 135).

Where the Guest is a Servant, his Master has a Right of Action.

A servant of the plaintiff was lodged at the defendant's house (an inn). He had a bag with 60*l.* of the plaintiff's therein. It was adjudged that the master might well have the action (*Beedle* v. *Morris* (1610), Cro. Jac. 224).

Remoteness of Damage.

"The question as to the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale* (1854), 9 Ex. 341, it is for the Court and not the jury to determine whether the case comes within any of the following rules, namely first, whether the damage is the necessary consequence of the breach; secondly whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made" (*McMahon* v. *Field* (1881), 7 Q. B. D. 591, at p. 595: *Brett*, L.J.).

See also, *post*, Chapter XI.—Carriers; Section XVII.—Damages.

SECTION III.

THE INNKEEPERS' LIABILITY ACT, 1863.

(26 & 27 Vict. c. 41.)

30l. Limit.

Section 1. No innkeeper shall, after the passing of this Act [13th July, 1863], be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, *not being a horse or other live animal, or any gear appertaining thereto, or any carriage*, to a greater amount than the sum of thirty pounds [30*l.*], except in the following cases; (that is to say,)

(1.) Where such goods or property shall have been stolen, lost, or injured through the *wilful act*, default, or neglect of such innkeeper or any servant in his employ:

(2.) Where such goods or property shall have been *deposited expressly for safe custody* with such innkeeper:

Provided always, that in the case of such deposit, it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. (7)

Section 2. If any innkeeper shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property.

Section 3. Every innkeeper shall cause at least one copy of the *first section* of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn; and he shall be entitled to the benefit of this Act in respect of such goods or

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Canadian Cases.

(7) By s. 3 (1) R. S. O. 1897, c. 187, the innkeeper shall not be liable for loss of goods and property of guests beyond 40 dols., except when such goods have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ, or when such goods have been deposited with the innkeeper expressly for safe-keeping.

property only as shall be brought to his inn while such copy shall be so exhibited.

Section 4. The words and expressions hereinafter contained, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word "inn" shall mean any hotel, inn, tavern, public-house, or other place of refreshment, *the keeper of which is now by law responsible for the goods and property of his guests;* and the word "innkeeper" shall mean the keeper of any such place.

As to the common law meaning of the words "hotel," "inn," "tavern," etc., see *ante*, p. 290, Section I.—(a) Common Law Definitions.

"*Wilful act, default, or neglect*," (see *supra*, s. 1).

Byles, J., in summing up, said that an innkeeper was, at common law, an insurer, and if goods of a guest were, without any negligence on the part of the guest, lost at his inn, the innkeeper was liable for their value. The harshness of this rule was mitigated by 26 & 27 Vict. c. 41 (The Innkeepers' Liability Act, 1863). Under this Act there were two questions to be decided by the jury. First, whether the property had been lost at the defendant's inn; and, secondly, whether it had been lost "through the wilful act, default, or neglect of the innkeeper or any servant in his employ." If the goods were lost at defendant's inn, then each plaintiff would be entitled to recover the amount of 30*l.*; if they were lost through "the wilful act, default, or neglect," etc., then each plaintiff would be entitled to recover the full value of the things lost. There might be a question whether the word "wilful" applied to each of the three succeeding words, "act, default, or neglect," or only to the word "act"; his lordship was of opinion that it applied only to the word "act" (*Squire* v. *Wheeler* (1867), 16 L. T. (N.S.) 93, at p. 94).

The Burden of Proof on Plaintiff under the Act.

"The statute [The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41)] leaves the rights and obligations of an innkeeper and his guest just as they were before, save that it provides that the innkeeper shall not be liable to make good to his guest any loss of property brought to his inn to a greater amount than the sum of 30*l.*, except (*inter alia*) when the property shall have been lost 'through the wilful act, default or neglect of such innkeeper, or

any servant in his employ.' The plaintiff in an action against an innkeeper for the loss of his goods can recover only 30*l*., unless he can show that the loss was the result of the wilful act, default, or neglect of the defendant or his servant. The Act gives protection to the innkeeper beyond the sum of 30*l*. unless one of these things is proved by the person who seeks to recover more than 30*l*. And he must prove that the loss resulted from that wilful act, default or neglect alone; if he himself contributed to the loss by his own negligence, the loss was not the result of the innkeeper's negligence alone. The plaintiff must show that the loss occurred without any contributory negligence of his own" (*Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, at pp. 22, 23: Lord *Esher*, M.R.).

Notice under s. 3 of the Innkeepers' Liability Act, 1863 (26 & 27 *Vict. c.* 41)—*Effect of a Material Omission in the Notice.*

Plaintiff was a guest at the hotel kept by the defendant, and while there, during the night of November 15th, 1875, the articles and money mentioned in the statement of claim, were stolen from his bedroom while he slept. The defendant had caused a copy of s. 1 of 26 & 27 Vict. c. 41, to be exhibited as required by the third section of the Act, in a conspicuous part of the hall or entrance to his inn; but the copy was unintentionally misprinted, and the sentence stood: "Where such property shall have been stolen, lost, or injured, through the wilful ['act' omitted] default or neglect of such innkeeper or any servant in his employ."

"We do not entertain any doubt as to the effect of the notice under the statute. I regret coming to the conclusion which I feel obliged to come to upon that point, because I have not the least doubt that there was a *bonâ fide* intention on the part of the defendant to give a notice which was an exact compliance with the statute, and that the omission which was relied upon has occurred entirely *per incuriam;* but it has occurred, and we must deal with the notice as it stands. Now at first it rather appeared that it might be looked upon as if there had been an omission of a word not material to the sense, and I certainly should not be prepared to hold that, if a paper had been put up in an inn, which was intended in good faith to be a copy of the section of the statute, and that all that could be said of it in opposition to its being a copy was that a word or two words which were not material to the sense and to the operation of the statute had been omitted, the paper had ceased to be, or failed to be, a copy within the meaning of the statute. But the word which is here omitted is the word

'act,' and the sentence, which should have run: 'stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper or any servant in his employ,' runs: 'stolen, lost, or injured through the wilful default or neglect of such innkeeper or any servant in his employ.' There is, therefore, nothing in the notice—no statement—which admits the continuance of the common law liability for the goods or property which shall have been stolen, lost or injured through the wilful act of the innkeeper or any servant in his employment. The result of that is this: if it could be supposed that, in a case like the present, the goods were actually stolen by a servant in the employment of the innkeeper, the notice, as it now runs, would be a notice asserting that the common law liability had ceased even in that case. It would be a notice not admitting the continuance of the common law liability, where what had led to the loss of the goods had been the act of a servant in the employ of the innkeeper.

"It is sufficient to say if that be so, the omission here entirely alters the operation of the section of the statute. The notice is, therefore, not a notice stating the law in the way the first section of the statute states it. I feel obliged, I repeat reluctantly, to hold that the claim for protection under the statute fails, and that the case must be dealt with as if the statute never had passed" (*Spice* v. *Bacon* (1877), 2 Ex. D. 463, at pp. 465, 466: Lord *Cairns*, L.C.).

"I concur in the view which has been just stated by the Lord Chancellor.

"I quite concur in thinking that if this were a mere clerical error, we might hold the notice sufficient to meet the requirement of the Act, as still being a copy; but when we find an omission of that which is material, with a view to a clear and distinct statement of the rights and liabilities of the parties respectively, we have an omission which is far beyond a mere clerical error. It is an omission of a substantial part of the notice. When we have an omission of a material and really substantial part of the notice required by statute, I cannot think it a copy sufficient to satisfy the requirements of the Act" (*ibid.*, at pp. 466, 467: *Cockburn*, C.J.).

Special Notice and Notice under the Act.

A notice that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same," was posted up in the plaintiff's room. The plaintiff's jewels, which were kept in a locked jewel-box, in a basket-trunk that was locked in the plaintiff's dressing-room, were stolen.

"I think that there was no evidence of special contract that the defendants would be liable for the loss of the jewellery to an extent greater than that specified in the Innkeepers Act. The only evidence in support of the special contract was the notice posted up in the bedroom. That notice must be taken in conjunction with the fact that an ordinary notice under the Innkeepers Act was posted in the hall. There is, in my opinion, no evidence that the defendants intended to contract themselves out of the Act. Nor did the defendants lead the plaintiff to suppose, and she did not suppose, that they so intended" (*Huntly* (*Marchioness*) v. *Bedford Hotel Co.* (1891), 56 J. P. 53: Lord *Esher*, M.R.).

SECTION IV.

INNKEEPERS' LIEN.

An innkeeper's lien on goods brought by a guest as his own is founded upon the custom of the realm. (8)

An innkeeper's lien on such goods can be enforced not only as against the person who brought the goods as his luggage into the inn, but also as against the real and true owner of them.

The above doctrine is well settled, as the following cases will show.

1. "This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: He is to receive all guests and horses that come to his inn: He is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him

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Canadian Cases.

(8) By s. 2 (1) c. 187 of R. S. O., 1897, every innkeeper, boarding-house keeper, and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder, or lodger for the value or price of any food or accommodation furnished to such guest, etc., with a power of sale. By s. 4, where an innkeeper refuses to take in the goods or property of his guest he is not entitled to the benefit of the Act in respect of such goods. The Manitoba Innkeepers Act (Revised Statutes), 1891, c. 73, s. 3, is taken from the Ontario Act, s. 2, and is substantially the same. Section 4 provides that any innkeeper or boarding-house keeper may detain in his inn or boarding-house, and before the same shall have been removed out of such hotel or house, but not afterwards, the trunks and personal effects of any person who is indebted to him for board and lodging. By s. 7, this right of detention does not apply for wine or spirituous liquors. Section 9 extends the liability for goods or property to 200 dollars.

away, until he has satisfied the innkeeper for his meat" (*Robinson* v. *Walter* (1617), 3 Bulstr. 269: *Dodderidge*, J. (cited by *Kay*, L.J., in *Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, at p. 507)).

Lien on a Hired Carriage.

2. "I think it clear that with reference to the innkeeper's lien there is no distinction between the goods of a guest and those of a third person brought to an inn by a guest. Three judges to one were of this opinion in *Robinson* v. *Walter* (1617), 3 Bulstr. 269; and their opinion may be taken as sufficient authority for so reasonable a doctrine. The question, then, is, whether the innkeeper has the same lien on a carriage as on a horse. Surely he has the same lien in either case, and on the same principle. Most of the decisions are with respect to horses. This is obviously explainable by reference to the mode of travelling in former times. New usages have grown up; and, as carriages are commonly used in travelling, the innkeeper's duties and privileges are extended to them. It would be absurd to say that an innkeeper might receive a guest, but refuse to receive his carriage. An innkeeper must now have room for the carriages of his guests; and he is entitled to charge for the keep and care of them. He is, consequently, entitled to a lien for the keep and care of a carriage in like manner as for the keep and care of a horse" (*Turrill* v. *Crawley* (1849), 13 Q. B. 197, at pp. 202, 203: *Coleridge*, J.). (9)

Canadian Cases.

(9) "The innkeeper had such lien not only upon the goods of the guest, but upon any property which the guest took to the inn, even if the goods had been stolen, so long as the innkeeper did not know that they had been wrongfully come by" (*per Wilson*, C.J.: *Newcombe* v. *Anderson*, 11 O. R. 665).

This lien, however, would appear not to apply to a boarding-house keeper or lodging-house keeper whose lien is created by statute, and is limited to the baggage and property of the guest, boarder, or lodger. In the above case, J. and his wife took rooms in premises kept by defendant, called the "Shandon House," partly furnishing them, and agreeing to pay 50 dols. a month for rooms and board. Subsequently they rented from plaintiff a piano. They left the Shandon House in debt for board and lodging to R. A. the defendant, who thereupon detained the piano which was claimed by the plaintiff:—*Held*, that the relation between defendant and J. was not that of innkeeper and guest, but of boarding-house keeper and boarder. *Held*, also, that as the piano was not the property of J. and his wife, that defendant had no lien upon it under R. S. O., 1877, c. 147, now R. S. O., 1897, c. 187.

"Inasmuch as at the common law neither a boarding-house keeper nor a lodging-house keeper had any lien upon the goods of his boarder or lodger for the board or lodging of such boarder or lodger, nor had an innkeeper any lien upon the goods of a person, received by him into his inn as a boarder, nor upon the goods of a person, who having been at first received by him into his inn as a traveller, and having thereby become his guest, afterwards had changed his relation to the innkeeper from that of a guest to that of a boarder,

Lien on Goods brought by Guest though not his own.

3. Action for conversion of a blue bag and a letter-book.

The plaintiff, an attorney, brought an action against another person to recover the amount of a bill of costs. One Hulme had been clerk to the plaintiff during the time the bill was incurred, but had left his service before the trial. He was subpœnaed to attend as a witness for the plaintiff at Westminster. The witness, Hulme, when in London as such witness, put up at the White Hart, Millbank Row, kept by the defendant, and took with him there the plaintiff's blue bag with the book and index in it, and incurred a bill with the defendant. Hulme left without paying the bill, and the defendant claimed to retain the book, index and bag, on the ground of a lien upon them for his bill against Hulme during the time he was at his house.

"We are all of opinion that this a clear case of lien, and that it is very distinguishable from *Broadwood* v. *Granara* (1854), 10 Ex. 417. The bag was brought by the guest to the defendant's house with some things of his own in it, in the ordinary way. The defendant could have no suspicion that it contained property belonging to any third person. As to the argument that the defendant lost his lien by letting the guest go without paying his bill,—the short answer to that is, that the innkeeper never wants to assert his right of lien until the customer goes off without paying" (*Snead* v. *Watkins* (1856), 1 C. B. (N.S.) 267, at p. 272: *Cresswell*, J., delivering the judgment of the court (*Cresswell*, J., *Williams*, J., *Crowder*, J., and *Willes*, J.)).

Lien on a Hired Piano brought by the Guest as his own.

4. The defendant kept an hotel on Lake Windermere, and one Butcher came there with his wife and sister. In addition to board and lodging, Butcher had a private sitting-room. He brought with him a pianoforte, which the defendant thought was Butcher's own, but which he had hired of the plaintiff. This was put in the

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Canadian Cases.

the object of the Act, R. S. O. c. 147 was to afford a remedy for this by giving to the boarding-house keeper and lodging-house keeper a lien on the baggage and property of his guest, boarder, or lodger, for the value or price of any food or accommodation furnished to such guest, boarder, or lodger, and by giving to the innkeeper a like lien. . . . . This statute, however, only gives a lien on the baggage and property of the guest, boarder, or lodger, and does not by its words, or by necessary inference give any lien upon the baggage and property of third parties brought to the inn, boarding-house, or lodging-house by the guest, boarder, or lodger. . . . I think, therefore, that defendant has failed to establish a lien upon the piano under this statute, and her defence fails" (*per Armour*, J.: *Newcombe* v. *Anderson*, 11 O. R. 665).

sitting-room. After several weeks Butcher left the hotel 45*l.* in the defendant's debt for board, etc.; and on demand by the plaintiff, the defendant claimed to detain the piano, in exercise of his lien as an innkeeper, for the debt due from Butcher.

"It is admitted that in general an innkeeper has a lien on all goods which the guest brings with him as his own, whether they are his own or another's; and the only question raised is, whether the lien extends to goods which the innkeeper would not have been bound to receive. I may say that I should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usages of society, the innkeeper might be well held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question, because we are all clearly of opinion, that, the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it. Both on principle and authority the judgment must be affirmed" (*Threfall* v. *Borwick* (1875), L. R. 10 Q. B. 210, at pp. 211, 212: Lord *Coleridge*, C.J.). (10)

5. "The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regards to innkeepers. Their rights and liabilities are dependent upon that and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate, and say that he will take in the traveller, but not his luggage. If the traveller brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods. He has not to inquire whether the goods are the property of the person who brings them, or of some other person. If he does so inquire, the

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Canadian Cases.

(10) A boarding-house keeper has no lien on the goods of a person occupying rooms in his house under an agreement, for non-payment of his bill (*Light* v. *Abel*, N. B. Rep., Stephen's Digest, 1880, 253).

"An innkeeper is bound to receive such goods as a traveller may reasonably bring with him, but he is not bound to receive all such goods as the traveller may bring. But if he receives goods that he is not bound to receive, he is entitled to the same rights and subject to the same liabilities with respect to such goods as if he had received them, being bound to do so" (*per Armour*, J., in *Newcombe* v. *Anderson*, 11 O. R. 147).

traveller may refuse to tell him, and may say, 'What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in'; or he may say, 'They are not my property, but I bring them here as my luggage, and I insist upon your taking them in'; and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in, although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely, unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the law for two or three hundred years" (*Robins & Co.* v. *Gray*, [1895] 2 Q. B. 501, at pp. 503—505: Lord *Esher*, M.R.).

6. "I cannot do better than read what *Lopes*, L.J., said in *Gordon* v. *Silber* (1890), 25 Q. B. D. 491, at pp. 492, 493: 'The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title.' I agree with that: it is good law, and is not disputed in this case; nor can it be disputed because it is settled by authority" (*ibid.*, at p. 509: *A. L. Smith*, L.J.).

Innkeeper cannot detain the Person of his Guest till Payment.

In Bacon's Abridgement—Inns and Innkeepers (D.) it is stated: "Innkeepers may detain the person of the guest who eats . . . till payment"; and in the marginal note a reference is given to

Newton v. *Trigg* (1603), Show. 269, Case 166 ; and it is added as a reason for the law, "For it would be hard to oblige him to sue for every little debt, and a greater hardship that he might not be able to find him who was his guest."

This doctrine (described in Smith's Leading Cases as a "vulgar error," Vol. I., 9th ed., p. 143) is certainly now no longer law, as will be seen by the following case.

An Innkeeper has no Right to detain the Person of the Guest, nor what he may be wearing or carrying, for the non-payment of his Bill.

"If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid,—which may be for life: so that this defence supposes, that, by the common law, a man who owes a small debt, for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. Again, if he have any right to detain the person, surely he is a judge in his own cause ; for, he is then the party to determine whether the amount of his bill is reasonable, and he must detain him till the man brings an action against him for false imprisonment, and then if it were determined that the charge was not reasonable, and it appeared that the party had made an offer of a reasonable sum, the detainer would be unlawful. But where is the law that says a man shall detain another for his debt without process of law? As to a lien upon the *goods*, there are undoubtedly cases of exception to the general law in favour of particular claims; and, if an innkeeper has the possession of the goods, and his debt is not paid, he has a right to detain them by virtue of that possession: but I do not agree that he has any right to take a parcel or other property out of the possession of the guest. If the guest is robbed of goods while they are in his own hands, the innkeeper is not liable. It appears to me, therefore, being without any authorities on the subject, that the plea is in principle utterly bad, and that there is no ground for the attempt to justify an assault, under the pretence of detaining a man for a debt due to an innkeeper. It is also bad under the pretence of justifying the stripping the plaintiff's coat off his back, and thereby inviting a breach of the peace, and making an assault necessary in order to exercise the right to the lien on the coat" (*Sunbolf* v. *Alford* (1838), 3 M. & W. 248, at p. 254: Lord *Abinger*, C.B.).

"That authority [*Newton* v. *Trigg* (1603), Show. 269, Case 166] has been overruled by the Court of Queen's Bench" (*ibid.*, at p. 253: *Parke*, B.).

An Innkeeper has no Lien on his Guest's Goods unless they came into the Innkeeper's Possession in his Character of Innkeeper. (11)

"The carriage and horses were received by the defendant as a livery-stable keeper, and not in his character of innkeeper. Neither the plaintiff nor his friend became guests at the inn, or had any refreshment supplied to them there, until after the horses and carriage had been placed there: and the lodging and refreshment so furnished were furnished upon a contract totally distinct from, and irrespective of, the contract upon which the horses and carriage were received in the first instance. The right of lien of an innkeeper depends upon the fact that the goods came into his possession in his character of innkeeper, as belonging to a guest" (*Smith* v. *Dearlove* (1848), 6 C. B. 132, at pp. 134, 135: *Wilde*, C.J.).

An Innkeeper has no Lien on Goods or Chattels unless they are brought by his Guest.

"The plaintiff was not bound in point of law to pay for the keep, as the horse was not brought to the inn by a guest [but by the police]; and an innkeeper has no lien upon an animal put into his stable unless it be brought by a guest" (*Binns* v. *Pigot* (1840), 9 C. & P. 208, at p. 209: *Parke*, B.).

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(11) One W. left his horses at the plaintiff's inn, agreeing that he should retain them as security for their keep. He was a teamster not living at the plaintiff's, and it appeared that he used the horses as he wished, sometimes keeping them away for several days, and that the plaintiff also used them when he chose, for which W. said he supposed the plaintiff would allow him against their keep. W. had had them away for three days and had brought them back into the plaintiff's yard, when they were seized under a Division Court execution against W. In an action brought by the plaintiff for this seizure the jury having found for the plaintiff, the question whether the goods had before the seizure been actually returned into the plaintiff's possession not having been submitted to them:—*Held*, that it could not be assumed that they had found this not to have been the case, and a new trial was granted without costs. "The plaintiff clearly had no lien upon these horses as an innkeeper, because W., the owner, was not a guest at the inn. Neither has the plaintiff a lien at common law on these horses merely because the owner delivered them to him to stable, feed and take care of them. . . . . The right to a lien must depend on the special agreement. . . . . The general rule is that there can be no lien upon any property unless it is in the possession of the party who claims the lien, and unless by express contract this rule applies where the possession has been parted with and has afterwards been recovered" (*Crabtree* v. *Griffith*, 22 U. C. Q. B. 573: *Draper*, C.J.).

An innkeeper has no lien for the keep of horses unless the owner is a guest (*Neale* v. *Croker*, 8 U. C. C. P. 224).

An Innkeeper has no Lien on Goods which a Guest brings with him not as his own Goods.

A Monsieur Hababier, a foreigner and professional pianist, went to reside at the defendant's hotel, and remained there, occupying apartments and occasionally taking his meals in the house, for some months. M. Hababier borrowed without charge a pianoforte from the plaintiffs. This pianoforte, known by the defendant to belong to the plaintiffs, remained at the hotel in possession of M. Hababier, in his apartments. During the time M. Hababier remained at the hotel, he incurred a bill for the use of the apartments and for board, hire of carriages, and other accommodation, to a considerable amount. The defendant declined to deliver up the pianoforte unless his bill was paid.

"We [*Pollock*, C.B., *Alderson*, B., and *Platt*, B.] are all of opinion that the lien claimed by the defendant cannot prevail. I need not go through the series of decisions referred to, or the propositions propounded at the bar, because the limited ground on which I think the plaintiffs entitled to judgment is this—that there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is a case of goods, not brought to the inn by a traveller *as his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that third person. I shall not inquire, whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose" (*Broadwood* v. *Granara* (1854), 10 Ex. 417, at p. 422: *Pollock*, C.B.).

An Innkeeper's Lien is general and cannot be split up.

The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his departure from the inn he owed the defendant 109*l.* for lodging, food and entertainment. In November, 1876, a pair of horses, waggonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff, who lived at Leamington. The horses, waggonette, and harness were not taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time the latter quitted the inn, he was in

debt to the defendant for the keep of these horses, and the defendant claimed on this account from him 22*l.* 10*s.* Bennett left the horses, waggonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses.

"The first question for our decision is, what was the innkeeper's lien; was it a lien on the horses for the charges in respect of the horses, and on the carriage in respect of the charges of the carriage and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly for the whole amount of the defendant's claim as innkeeper? I am of opinion that the latter was the true view as to his lien, and for this reason, that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items. An innkeeper may demand the expenses before he receives the guest, but if he does not, and takes him in and finds him in all things that the guest requires it is one contract, and the lien that he has is a lien in respect of the whole contract to pay for the things that are supplied to him while he is a guest. If this was not the case a man might go to an hotel with his wife, and then it might be said that the innkeeper's lien was on the guest's luggage for what he had consumed, and on the wife's luggage for what she had had. The contract was, that the guest and his horses and carriages shall be received and provided for; there was one contract, one debt, and one lien in respect of the whole of the charges" (*Mulliner* v. *Florence* (1878), 3 Q. B. D. 484, at p. 488: *Bramwell*, L.J.).

"I am of opinion the lien attached both on the horses and the carriage and harness for the full amount of the innkeeper's bill. Where the innkeeper in the course of his ordinary business receives not only travellers but also their horses and carriages, he has an innkeeper's lien for his whole claim. He has one obligation, he is bound to receive the traveller and any horses or carriages he may bring with him; and as there is but one business, one obligation and one contract, according to the custom of England, it gives him one lien, and the lien cannot be split up and a separate lien claimed in respect of separate chattels. Therefore here the defendant has a lien for the whole bill incurred by Bennett, and that lien is on the carriage and horses and harness" (*ibid.*, at p. 492: *Brett*, L.J.).

"The question is what is the defendant's lien as innkeeper? Is it a lien as to the whole bill in respect of all the things brought by

the guest to the inn, or is it a separate lien as regards the horses and also with respect to the harness and carriage? The innkeeper has a general lien for the whole amount of his bill. As to the horses, harness and carriage, there would be a lien for any special expenditure, and there is no reason for exempting the horses, harness and carriage from the general lien an innkeeper has in the guest's goods by the general law. The innkeeper is bound to receive the horses, harness and carriage with the guest as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest, and there is no reason for excluding the claim of the innkeeper, although the horses, harness and carriage are not received in the dwelling-house, but in adjoining buildings. There is no authority for saying that the innkeeper's lien does not extend to the horses, harness and carriage the guest brings with him as much as to the other things of the guest" (*ibid.*, at p. 493: *Cotton*, L.J.).

Duration of Lien.

"No doubt, so long as the guest stays in the hotel, even though he has ceased to be a traveller, the lien incident to the relation of host and guest continues" (*Lamond* v. *Richard*, [1897] 1 Q. B. 541, at p. 544: *Wright*, J.). (12)

Innkeeper's Lien not lost by taking Security.

The defendant and his wife went to stay at the plaintiff's hotel. Bills were delivered to the defendant weekly, and he paid the first bills. Then difficulties arose, the defendant was in want of money, and could not pay the bills. The plaintiff, however, allowed the defendant and his wife to stay on on the defendant promising to pay when he could, and the plaintiff took a letter from the defendant charging certain property.

"I am asked to say that the acceptance of this letter was a waiver of the plaintiff's lien, and thus a question of very considerable importance is raised. It has been said in argument that if an

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(12) When it appeared that A. had lived at an hotel with his family for some time, using his own furniture, and had incurred a considerable debt to the landlord, it was *held* that, although the landlord could have no lien as an innkeeper, yet as A. had, on leaving, consented to leave part of his furniture as security, the landlord was clearly entitled to a lien on such furniture by virtue of the agreement with A. (*R.* v. *Askin*, 20 U. C. Q. B. 626).

innkeeper, having by common law a lien upon the goods of his guest, accept any security at all from him, that is *ipso facto* a waiver of the lien. That, in my opinion, is not the law. . . . As I understand the law it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it. In this case the lien is within the provisions of 41 & 42 Vict. c. 38 (Innkeepers Act, 1878), by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required by the Act. Is it probable that he would have given up this active lien?" (*Angus* v. *McLachlan* (1883), 23 Ch. D. 330, at pp. 333—336 : *Kay*, J.).

SECTION V.

INNKEEPER'S POWER OF SALE.

"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods" (*Pothonier* v. *Dawson* (1816), Holt Rep. N. P. 383, at p. 385 : *Gibbs*, C.J.).

The enactment next set out gives an innkeeper a right to sell, under certain circumstances, the goods on which he has a lien.

THE INNKEEPERS ACT, 1878.
(41 & 42 Vict. c. 38.)

An Act for the further relief of Innkeepers. [8th August 1878.]

Preamble.

Whereas it is just and expedient to give, in addition to the present right of lien, a power of sale (13) under certain circumstances to keepers of hotels, inns, and licensed public-houses upon

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(13) Section 2 (1), R. S. O. 1897, c. 187, gives lien on baggage, etc., for accommodation, etc., furnished, and power to sell after default in payment for three months on giving one week's notice in the local newspaper.

Section 2 (2) of R. S. O. 1897, c. 187, provides that where an innkeeper, boarding-house keeper, or livery stable keeper, has by law a lien upon a horse or other animal for the price of any food, etc., he shall, in addition to all other remedies provided by law, have the right in case any part of such price or value remains unpaid for the space of two weeks, to sell by public auction such horse, etc.

An innkeeper, claiming to act under this section of R. S. O., c. 187, sold by public auction a stallion belonging to the plaintiff, a boarder at his inn, to enforce a lien thereon for the keep and accommodation thereof :—*Held*, that

and in respect of goods and chattels deposited with them or upon the tenements and premises occupied by them :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows ; that is to say,

Right to Sell.

1. The landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house shall, in addition to his ordinary lien, have the right absolutely to sell and dispose by public auction of any goods, chattels, carriages, horses, wares, or merchandise which may have been deposited with him or left in the house he keeps, or in the coach-house, stable, stable-yard, or other premises appurtenant or belonging thereunto, where the person depositing or leaving such goods, chattels, carriages, horses, wares, or merchandise shall be or become indebted to the said innkeeper either for any board or lodging or for the keep and expenses of any horse or other animals left with or standing at livery in the stables or fields occupied by such innkeeper.

Time for Sale—Surplus Proceeds.

Provided that no such sale shall be made until after the said goods, chattels, carriages, horses, wares, or merchandise shall have been for the space of *six weeks* in such charge or custody or in or upon such premises without such debt having been paid or satisfied, and that such innkeeper, after having, out of the proceeds of such sale, paid himself the amount of any such debt, together with the costs and expenses of such sale, shall on demand pay to the person depositing or leaving any such goods, chattels, carriages, horses, wares, or merchandise the surplus (if any) remaining after such sale :

Canadian Cases.

the lien existed, and the sale was authorized. After the lien accrued, the plaintiff removed the stallion and subsequently brought it back to him :—*Held*, that the lien revived on return of the stallion. *Per Galt*, C.J. : By the common law an hotel keeper had a lien on horses the property of his guest or brought to his inn by a guest, consequently the lien on the horse did exist, and the power of sale applies (*Hoffman* v. *Walterhouse*, 19 O. R. 186).

By s. 3 of R. S. O., c. 187, an innkeeper is not liable for loss of goods and property of guest beyond forty dollars unless lost by his wilful default, or unless deposited with him for safe keeping.

Revised Statutes of British Columbia, 1897, c. 98, is copied from the Ontario Act, the only alteration being that the power to sell arises after twelve months' default, and the innkeeper's liability for loss of goods extends to fifty dollars.

The Debt for the Payment of which the Sale can be made.

Provided further, that the debt for the payment of which a sale is made shall not be any other or greater debt than the debt for which the goods or other articles could have been retained by the innkeeper under his lien.

Notice of Sale by Advertisement.

Provided also, that at least one month before any such sale the landlord, proprietor, keeper, or manager shall cause to be inserted in one London newspaper and one country newspaper circulating in the district where such goods, chattels, carriages, horses, wares, or merchandise, or some of them, shall have been deposited or left, an advertisement containing notice of such intended sale, and giving shortly a description of the goods and chattels intended to be sold, together with the name of the owner or person who deposited or left the same where known.

2. This Act may be cited as The Innkeepers Act, 1878.

SECTION VI.

DISTRESS.

A guest's goods and chattels cannot be distrained upon while on the premises of the innkeeper.

For the security and protection of travellers, inns are allowed certain privileges, such as that the horse and goods of a guest cannot be distrained, etc. (Bac. Abr., Inns and Innkeepers (B.).

Cf. also *ante*, p. 263, Chapter VIII.—Hire of Work, Labour and Services; Section X.—Distress; and *ante*, p. 281, Chapter IX.—Hire of Custody; Section II.—Warehousemen, (d) Distress; and, *ante*, p. 287, Section III.—Wharfingers, (e) Distress; and *post*, p. 736, Chapter XI. — Carriers; Section XXII.—Distress.

The Privilege exists for the Benefit of Trade.

"The principle, on which exceptions in the case of certain trades have been engrafted on the general liability of goods to be distrained for rent when found on the demised premises, appears to be, that the trade or business could not be carried on, except the goods were privileged from distress. Thus, goods left with a carrier to be carried or pledged with a pawnbroker are privileged; and goods which are received to be taken care of and warehoused seem to come entirely within the same principle. The law of distress by which one man's goods are made to pay for another

man's debts, is not one which should be carried beyond the limits to which it has already been confined" (*Miles* v. *Furber* (1873), L. R. 8 Q. B. 77, at p. 83: *Archibald*, J.).

"*Primâ facie*, any goods found on the demised premises are distrainable for rent. The law for the benefit of trade makes certain exceptions. . . . But the privilege is attached to the premises for the benefit of trade, and extends no further. In this view of the matter the case of *Crosier* v. *Tomkinson* (1759), 2 Ld. Ken. 439, has an explicit bearing on the present case; it illustrates the rule and shows the limitation of the privilege. There 'a person, who was tenant to [the] defendant, gave leave to an innkeeper to make use of his stable (which was at some distance from the inn) to put horses in during the race week. Plaintiff's race horse was brought to the innkeeper's, and by him placed in the said stable which he had borrowed from the defendant's tenant. The defendant distrained the horse for rent due to him from his tenant, and for that the action was brought. The question was, whether the horse, under the circumstances, was privileged from the distress, under a notion that this stable was part of the inn. The court were clearly of opinion that the privilege of inns did not extend to this stable. The Chief Justice said, he thought the owner was not without his remedy, but must come upon the innkeeper, under the implied warranty for safe custody'" (*Lyons* v. *Elliott* (1876), 1 Q. B. D. 210, at pp. 215, 216: *Lush*, J.).

SECTION VII.

REPUTED OWNERSHIP.

Section 44 (iii) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), seems not to apply to the trade or business of an agister (*Ex parte Huggins*, (1886), 3 M. B. R. 75), a clock repairer (*Bell* v. *Hamilton* (1854), 10 Ex. 445), a warehouseman (*Ex parte Watkins* (1873), L. R. 8 Ch. 520), nor to furniture hired by an innkeeper (*Ex parte Turquand* (1885), 14 Q. B. D. 636, where, at p. 643, the Earl of *Selborne*, L.C., says: "When the existence of a custom notorious in a particular trade or business is proved . . . then the doctrine of reputed ownership is absolutely excluded as to all articles which are within the scope of the custom").

The custom must be notorious to all the world or among traders generally and not a custom well known only to those who deal in a particular market (*In re Goetz, Jonas & Co.*, [1898] 1 Q. B. 787: *A. L. Smith* and *Collins*, L.JJ.).

CHAPTER XI.

CARRIERS.

SECTION I.—*Definitions*, p. 337.
SECTION II.—*Carriers classified and distinguished*, p. 338.
SECTION III.—*Roadworthiness and Seaworthiness*, p. 351.
SECTION IV.—*Common Law Contract of Carriage*, p. 359.
SECTION V.—*Duty and Responsibility of Common Carriers*, p. 372.
SECTION VI.—*Restriction of Carrier's Obligations and Liability by Public Notice or Special Contract*, p. 389.
SECTION VII.—*Carriers Act*, 1830, p. 411.
SECTION VIII.—*Railway and Canal Traffic Act*, 1854, p. 439.
Regulation of Railways Act, 1868, p. 474.
Regulation of Railways Act, 1871, p. 474.
Merchant Shipping Act, 1894, p. 475.
SECTION IX.—*Statutory Tolls, Rates, and Charges*, p. 480.
SECTION X.—*Dangerous Goods*, p. 492.
SECTION XI.—*End of Transit*, p. 499.
SECTION XII.—*Title of Third Person*, p. 525.
SECTION XIII.—*Carrier's Agents and Servants*, p. 527.
SECTION XIV.—*Passengers*, p. 540.
SECTION XV.—*Passengers' Luggage*, p. 572.
SECTION XVI.—*Charter-party and Bill of Lading*, p. 596.
SECTION XVII.—*Damages*, p. 663.
SECTION XVIII.—*Demurrage*, p. 682.
SECTION XIX.—*Average and Contribution*, p. 701.
SECTION XX.—*Stoppage in Transitu*, p. 715.
SECTION XXI.—*Lien*, p. 727.
SECTION XXII.—*Distress*, p. 736.

We have now to deal with carriers, the third and last class of hire (see *ante*, p. 204), or *Locatio operis mercium vehendarum* when goods and chattels are bailed to a *private* person to carry or to a *public* carrier. *Story* truly describes it (s. 78) as a "highly important branch of bailments." It is necessary to bear in mind that in this

work we are only concerned with the law of carriers so far as the same is a branch of the law of bailments.

SECTION I.

DEFINITIONS.

A *carrier* is one who carries. The word "carry" is derived from the Latin word *carrus*, a kind of four-wheeled waggon or cart.

"'*Carrier*,' in its general sense, means a person who undertakes to transport the goods of other persons from one place to another for hire" (Wharton's Law Lexicon). (1)

"Every person who accepts goods and chattels for conveyance to a particular destination for hire or reward, paid or agreed to be paid him for the carriage of them, impliedly lets out his labour and care in return for the hire or reward agreed to be paid to him. The contract, therefore, belongs to the class *locatio operis*. It was styled by the Roman jurists *locatio operis mercium vehendarum*, or the letting out of the work of carrying merchandise. The owner who delivered the goods to the carrier to be carried was the letter of the work of carrying; and he was also at the same time hirer of the labour and services of the carrier; whilst the carrier, on the other hand, was both the hirer of the work of carrying and the letter of his own labour and services, care, and attention, to be employed in and about the conveyance and transport of the merchandise" (Addison on Contracts, 7th edit., pp. 717, 718).

Canadian Cases.

(1) A forwarder is a common carrier, and is not liable for loss arising from the act of God or the king's enemies. *Per Robinson*, C.J.: It is desirable, I think, for all parties not to attempt too great refinement in drawing the line between the act of God, and the ordinary dangers of navigation against which skill and prudence may guard, because that would encourage litigation in most cases of loss from the uncertainty of the decision, each party hoping to shift the loss upon the other. It is better for the parties themselves to be impressed with the conviction that if they wish to be secure against all danger, they must be careful to insure. When they fail to do so, it should be considered that they take the risks of tempest upon themselves, and they should not seek to be rigid in throwing upon the carriers such risks as they ought to have guarded against by insurance (*Smith* v. *Whiting*, 3 U. C. Q. B. (o.s.) 597).

The Crown cannot be held liable as a common carrier (*Queen* v. *McFarlane*, 7 S. C. R. 216; *Lavoie* v. *The Queen*, 3 Ex. C. R. 96).

The Crown is not liable as common carriers (*Queen* v. *McLeod*, 8 S. C. R. 1).

Plaintiff sent boards alongside of defendant's vessel to be shipped, but before being taken on board, they had to be surveyed and classified by plaintiff, and before this was done they were stolen:—*Held*, that until the survey and classification, they were not in defendant's possession, and he was not liable for their loss (*Cushing* v. *Roberts*, N. B. Rep. 5 All. 296).

SECTION II.

CARRIERS CLASSIFIED AND DISTINGUISHED.

(*a*) *Gratuitous Carriers*, p. 338.
(*b*) *Private or Special Carriers for Hire*, p. 339.
(*c*) *Quasi Common Carriers*, p. 342.
(*d*) *Common Carriers*, p. 343.

There are carriers of goods and chattels and carriers of passengers.

There are carriers by land and carriers by water.

Of carriers by land, there are carriers by road who use such vehicles as carriages, carts, motor cars, trams and trains.

Of carriers by water, there are carriers by canals, rivers, and sea who use ships, boats, and other vessels.

These carriers may be divided into—

(*a*) GRATUITOUS CARRIERS;
(*b*) PRIVATE OR SPECIAL CARRIERS FOR HIRE;
(*c*) QUASI COMMON CARRIERS; and
(*d*) COMMON CARRIERS.

(a) Gratuitous Carriers.

There are carriers without reward or hire, viz., gratuitous carriers. This class of carriers has already been treated of under the head of Mandates, to which the reader is referred. See *ante*, p. 103, Chapter III.

As, however, the celebrated case of *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, was a case of gratuitous undertaking to carry several hogsheads of brandy lying in one cellar to another cellar, and the carrying was managed so negligently, that one of the casks was staved and a great quantity of brandy spilt, it may as well, in passing, be mentioned once more here, and so too may the following case:—

The defendant was the coachman of a stage-coach; the parcel in question was delivered to him on the road. It was a small parcel, which the plaintiff had given to a Mr. Fagg, one of the proprietors of the coach, to take and show it to a particular person, and to return it if not approved. Fagg's servant delivered it to the defendant, to return it to the plaintiff, with the word "value" written on it, and addressed to Mr. Fagg at the coach office; and gave him directions to take particular care of it, and deliver it to William Kent, the book-keeper, as it was of value. The parcel was not delivered, and on enquiring of the defendant, he knew

nothing about it, and had entirely forgotten it: he afterwards suggested two or three modes of enquiring about it, which proved ineffectual. The parcel being delivered on the road, there was no entry of it on the way-bill; and being delivered by the servant of one of the owners, no carriage was charged for it.

"That question [of fact for the jury] will be, whether there was gross negligence on the part of the defendant. Nothing was to be paid for its conveyance; but still if the coachman received it, it was his duty to take care of it, and deliver it at the office in Holborn, to which it was addressed. The parcel was of value, and known to him to be so; and it being his duty to deliver it, the jury are to say whether there was great negligence on the part of the defendant; if there was not great, and somewhat extraordinary, negligence on his part, the verdict ought to be for him" (*Beauchamp* v. *Powley* (1831), 1 Moo. & Rob. 38, at p. 40: Lord *Tenterden*, C.J.).

In the absence of a special contract the gratuitous carrier, being a mandatary, is bound to act prudently and honourably and to use such reasonable care, diligence, skill, and knowledge as he actually possesses or as can be implied from his profession, employment or situation, and he is only liable for gross negligence. See *ante*, p. 109, Chapter III.—Mandates; Section III.—(c) Degree of Care, Diligence, Skill, and Knowledge demanded of a Mandatary.

Of carriers *for reward or hire* there are three sorts, namely, private or special carriers, quasi common carriers, and common carriers.

(b) Private or Special Carriers for Hire.

"In respect to contracts of this sort [the carriage of goods for hire] entered into by private persons, who do not exercise the business of common carriers, there does not seem to be any material distinction, varying the rights, obligations, and duties of the parties from those of other bailees for hire. Every such private person is bound to ordinary diligence, and to a reasonable exercise of skill; and of course he is not responsible for any losses, not occasioned by the ordinary negligence of himself or of his servants. He will not, therefore, be liable for any loss by thieves, or for any taking from him or them by force, or where the owner accompanies the goods to take care of them, and is himself guilty of negligence. This is the general rule; and it of course applies to all cases where he has not assumed the character of a common carrier, unless, indeed, he has expressly, by the terms of his contract, taken upon himself any such risk" (Story, s. 457).

Carriers for reward or hire who do not as a regular trade or

business undertake for reward or hire to carry goods and chattels for anyone who may choose to employ them, but only occasionally and for particular persons of their own choosing, are not what are called common carriers. They may conveniently be called private or special carriers, though, as appears from the following cases, they may render themselves liable by their special contract as common carriers. (2)

A Special Carrier may put Himself into the Situation of a Common Carrier by his Warranty.

1. The plaintiff, an upholsterer, having occasion to send some furniture into the country, agreed with one Groves, a carman, to take the same for ten guineas, exclusive of tolls. Groves, thinking the distance too great, offered the defendant, who also kept a cart and horse, the refusal of the job, who agreed to undertake it, and gave Groves half a guinea by way of gratuity. The plaintiff having acceded to the defendant's offer to go instead of Groves, the defendant brought his cart to the plaintiff's house, where the goods were loaded in the presence of the plaintiff himself, and with the assistance of two of the plaintiff's servants. The plaintiff having observed that the tarpaulin which the defendant had brought for the purpose of covering the cart was too small, the defendant said, "I have plenty of sacks, and I will warrant the goods shall go safe." On account of the defendant being a stranger to the plaintiff, the latter sent one of his own porters with the cart, who would otherwise have gone by the stage. This porter, in the course of the journey, paid a person for watching the goods one night. The goods, in the course of the journey, were damaged by rain.

"This is a very clear case. The defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if

Canadian Cases.

(2) A person engaging to transport goods for hire is not by virtue of such engagement merely a common carrier, and as such liable for all accidents, whether negligent or not (*Benedict* v. *Arthur*, 6 U. C. Q. B. 204).

the portmanteau be lost. In this case the plaintiff for greater caution sends his servant with the goods, who pays for watching them because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from Strange [*The East India Company* v. *Pullen* (1726), 2 Str. 690], for there the decision proceeded on the usage of the East India Company, who never intrust the lightermen with their goods, but give the whole charge of the property to one of their own officers, who is called a guardian. The evidence of the warranty is perfectly clear, for on the plaintiff's making some objection to the smallness of the tarpaulin, the defendant in order to remove that difficulty, informed him that he had plenty of sacks to cover the goods, and undertook that they should be carried safe" (*Robinson* v. *Dunmore* (1801), 2 B. & P. 416 at p. 419: *Chambre*, J.).

Master of a Store-ship signing a Bill of Lading.

2. "This was an action against the master of a store-ship for the loss of a parcel of bullion which he had undertaken to bring home from Gibraltar, and which had not been delivered. The defendant certainly is answerable for not delivering this property, unless it can be shown that the transaction was an illegal one, and that the plaintiff participated in that illegality. The plaintiff was a merchant residing here and acting through his agent at Gibraltar. The master of the store-ship takes the bullion on board, signing a bill of lading, whereby he undertakes in the usual course for its safe delivery here, the act of God and the king's enemies excepted, and the defendant actually receives the freight for it. If this were an illegal transaction, the plaintiff could not recover for non-performance of a contract that ought never to have been made" (*Hatchwell* v. *Cooke* (1816), 6 Taunt. 577, at pp. 579, 580: *Gibbs*, C.J.).

Liability of a Person, not a Common Carrier, who Carries Goods for Hire.

3. The plaintiff, who had resided at Ramsgate, was quitting his residence. About the beginning of November, he sent up several packages by a steamer to Nicholson's Wharf; and on the fourth of that month, he himself came up by another steamer, with other packages, to Fresh Wharf. About six o'clock in the evening of that day, the plaintiff, wishing to have the packages carried from both these wharfs to Brooke's Wharf, went to a stand of carts in

Thames Street, at which a cart of the defendant was plying for hire. The defendant was the owner of thirty or forty carts, which were in the habit of standing near the wharfs, ready to be hired by any person who chose to engage them, either by the hour, day, or job, the defendant being what was called a town carman. On the arrival at Brooke's Wharf one of the packages was missing.

"My opinion is, that the defendant is not a common carrier; and, if necessary, I will give leave to move to enter a nonsuit on that point. The next question is, whether the plaintiff delivered these goods to the defendant as a common carrier. Now, a common carrier is in the nature of an insurer, and if he carries without any qualification of his liability, he becomes an insurer against all but fire, tempest, and the king's enemies, and he insures against thieves, and the frauds of his own servants. Still, there are cases in which, although a person is not a common carrier, he is liable for the neglect of his own servants. I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves, or by any taking by force; or if the owner accompanies the goods, to take care of them, and was himself guilty of negligence, for it is a rule of law that a party cannot recover, if his own negligence was as much the cause of the loss as that of the defendant" (*Brind* v. *Dale* (1837), 8 C. & P. 207, at p. 211: Lord *Abinger*, C.B., in summing up).

(c) Quasi Common Carriers.

There are government carriers who are quasi common carriers, *e.g.*, the Post Office.

Liability of Post Office Officials.

Case against the Postmaster-General for a 100*l.* bank note stolen by one of the sorters out of a letter, at the General Post Office in London.

"As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office, loses any of them, he is answerable; so is the *sorter* in the business of his department. So is the postmaster for any fault of his own. Here, no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a *constructive* negligence only, by the act of their servants. In order to succeed therefore it must be shown, that it is a loss to be supported by the postmaster, which it

certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an Act of Parliament, the salary annexed to the office, is for no other consideration than the trouble of executing it. The case of the postmaster, therefore, is in no circumstance whatever, similar to that of a common carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, etc., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments.

"Thus then the question stood in the year 1699. In that year a solemn judgment was given, that an action on the case would *not* lie against the Postmaster-General, for a loss in the office by the negligence or fault of his servant. The nation understood it to be a judgment: and therefore it makes no difference, if what has been throw out were true, and the writ of error was stopped in the way that has been mentioned. For the bar have taken notice of it as a judgment; the parliament and the people have taken notice of it, every man who has sent a letter since has taken notice of it; many Acts of Parliament for the regulation and improvement of the Post Office, and other purposes relative to it, have passed since, which by their silence have recognised it. The mail has been robbed a hundred times since, and no action whatever has been brought. What have merchants done since and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times: one, by this day's post, the other, by the next. This shows the sense of mankind as to their remedy. If there could have been any doubt therefore before the determination of *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646, the solemn judgment in that case having stood uncontroverted ever since, puts the matter beyond dispute. Therefore, we are all clearly of opinion the action will not lie" (*Whitfield* v. *Lord Le Despencer* (1778), 2 Cowp. 754, at pp. 765, 766: Lord *Mansfield*).

(d) Common Carriers.

Common carriers are those who undertake to carry goods by land or water for anyone for hire or reward.

"All persons carrying goods for hire, as masters and owners of ships, lightermen, stage coachmen, etc., come under the denomination of common carriers, and are chargeable on the general custom of the realm, for their faults and miscarriages" (Bac. Abr. Carriers (A.)).

The general custom of the realm is that a common carrier

insures the goods and chattels [not passengers] he carries against all damage and loss but that arising from the act of God, the public enemy or inherent vice, and he has a lien on the goods and chattels for his hire or reward. See *post*, Section V.—Duty and Responsibility of Common Carriers ; and Section XXI.—Lien.

For carriers of passengers and passengers' luggage, see *post*, Sections XIV. and XV.

As to "act of God" and "Queen's enemies," see *post*, Section XVI.—Charter Party and Bill of Lading, (k).

"To bring a person within the description of a common carrier, he must exercise it [the undertaking] as a public employment ; he must undertake to carry goods for persons generally ; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*. A common carrier has, therefore, been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place" (Story, s. 495).

The above definitions are well explained and exemplified by the subjoined cases, arranged in order of date.

Stage Coachman carrying Goods.

Mr. Justice *Jones* was of opinion, that if a coachman [of a stage coach between London and Marlborough] carry goods, and take money for so doing, he will be in the same case with a *carrier*, and is a [*common*] *carrier* for that purpose, whether the [property of the] goods [is in the passenger or a stranger] : the like of a *waterman* or *Gravesend boat* which carries both men and goods (*Lovett* v. *Hobbs* (1692), Shower by Butt, 427).

In *Middleton* v. *Fowler* (1699), 1 Salk. 282, *Holt*, C.J., was of opinion that a stage-coachman was not within the custom [of the realm] as a carrier is, unless such as take a distinct price for carriage of goods as well as persons, as waggons with coaches ; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom, for no master is chargeable with the act of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master.

Carriers for Hire or Reward from places within Realm to places out of it, may be Common Carriers.

"The question is, can a man be a 'common carrier' of passengers from a place that is within the realm to a place out of it? Mr. Justice *Story*, in the very able treatise that has been referred to, defines a common carrier to be, a person who does just what the defendants in this case are proved to have done. He says [Story

on Bailments, s. 495]: 'A common carrier has been defined to be, one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.' It is said that the evidence here did not support the third issue, because the term 'common carrier' imports one who carries from and to places within the realm only. But, if we so construe it, we make the declaration bad and inconsistent: whereas, if we read it as meaning 'common carriers' according to the definition given by Dr. Story, viz., as persons holding themselves out as undertaking for hire or reward to transport the goods of such as choose to employ them, from place to place, we shall be giving the allegation a sense that will make it consistent with the breach. I see no reason for holding that 'common carriers' must of necessity mean persons employed to carry within the realm, and according to the custom" (*Benett* v. *Peninsular and Oriental Steamboat Co.* (1848), 6 C. B. 775, at pp. 786, 787: *Wilde*, C.J.).

Everyone who undertakes to carry for Hire for Anyone who asks him is a Common Carrier.

The defendant was employed by the plaintiffs, who were merchants, to take 100 cases of figs in his lighter from Mills' Wharf, in Thames Street, to the "Magnet" steamer, which lay in the River Thames. As the figs were on board the lighter, which was proceeding with them to the "Magnet," the lighter was run down by the "Menai" steamer, and the figs all lost. The defendant had a counting house with his name and the word "lighterman" on the door posts of it, and he carried goods in his lighters from the wharves to the ships for anybody who employed him. The defendant was a lighterman and not a wharfinger.

"Everybody who undertakes to carry for anyone who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is matter of special contract. Here we have a person with a counting house, 'lighterman' painted at his door, and he offers to carry for everyone" (*Ingate* v. *Christie* (1850), 3 C. & K. 61: *Alderson*, B.).

"Mr. Justice *Story* is a great authority, and if we would but adhere to principle, the law would be, what it ought to be, a science. There may be cases on all sides, but I will adhere to principle if I can. If a person holds himself out to carry goods for everyone as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier, and if the defendant is a common carrier he is liable here" (*id.*, at p. 63).

The Master and Owners of a General Ship are Common Carriers, but their Liability depends upon the Terms of the Bill of Lading.

"By the law of England, the master and owner of a general ship are common carriers for hire, and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God or the Queen's enemies. They, however, almost universally receive goods under bills of lading signed by the master; and in such case the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties—the owner of the goods on the one hand, and the master and owner of the ship on the other" (*Laveroni* v. *Drury* (1852), 8 Ex. 166, at p. 170: *Pollock*, C.B.).

Distinction between Common Carriers by Water and Carriers by Private Ships.

The English law of carriers is not derived from the Roman law.

"I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship. Parsons, a writer of considerable authority on this subject, defines a common carrier to be 'one who offers to carry goods for any person between certain termini and on a certain route.' He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage.' 'If either of these elements is wanting, we say the carrier is not a common carrier either by land or water.' 'If we are right in this,' he adds 'no vessel will be a common carrier that does not ply regularly, alone or in connection with others, on some definite route, or between two certain termini" (Parsons' Shipping, p. 245). Story seems to be of a like opinion. 'When it is said,' he observes, 'that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or foreign trade, or on general freighting business, for all persons offering goods on freight for the port of destination.' 'But if the owner of a ship employs it on his account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier' (Story on

Bailments, s. 501). So Angell, speaking of shipowners as common carriers, says: 'When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all person indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual, take goods on board for freight, not receiving them from all persons indifferently, he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment' (Angell on Carriers, s. 89). But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship.

"In the absence of all common law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier, as asserted in the judgment below, the authority of the Roman law is invoked; but this law on which so much stress is laid in the judgment of the Court of Common Pleas, affords no support to this doctrine. In the first place, it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our courts with reference to carriers by land, on whom the Roman law, as is well known imposed no liability in respect of loss beyond that of other bailees for reward. In the second place, the Roman law made no distinction between inevitable accident arising from what in our law is termed the 'act of God' and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from '*casus fortuitus*' or, as it is also called '*damnum fatale*' or '*vis major*' —unforseen and unavoidable accident . . . But not only does this essential difference between the Roman law and our own suffice to shew that, so far as the liability of carriers is concerned, our law has not been derived from the Roman: as matter of legal history we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance, established with reference to carriers by land to whom by the Roman law no such liability attached (1 Inst. 89A, *Woodliefe* v. *Curteis*, 1 Roll. Abr. 2. Action Sur Case, C. pl. 4). It was not till the ensuing reign, in the eleventh of James I., that it was decided in *Rich* v. *Kneeland* [(1614), Cro. Jac. 330; Hob. 17] that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no

difference between them. The next case in point of date, and it is the first case in the books in which the liability of the owner of a sea-going ship comes in question, is the well-known case of *Mors* v. *Slue* [(1673), 1 Vent. 190, 238], in which it was held, after a trial at bar, that where a ship lying in the Thames was boarded by robbers, who took the plaintiff's goods which had been loaded on board, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this case should be relied on as an authority for the position that the liability of a common carrier attaches to the shipowner or master where the ship is not a general ship; for though it is not expressly said that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shews conclusively that she was so. In the first place, the declaration is laid on the custom of the realm, and we know that the only custom to which effect had up to that time been given—and that quite in recent times—was in respect of common carriers by land, and still more recently in respect of common carriers by water. Secondly, *Hale*, C.J., in giving judgment, puts the case as on all fours with that of a common carrier or hoyman, and nowhere says that it is to be treated as that of a private ship. 'He who would take off the master from this action,' says the Chief Justice, 'must assign a difference between it and the case of a hoyman, common carrier, or innholder.' Doubtless the counsel for the defendant, if the case had been distinguishable on the ground that the vessel was not a common ship, would have pointed out the difference, and at all events have taken the point; and in the corresponding report of the same case in Levinz (2 Lev. 69), the case of *Rich* v. *Kneeland* (1614), Cro. Jac. 330, Hob. 17, having been referred to, the Chief Justice is reported to have said that the case "differed not from that of the hoyman." But in the case of *Rich* v. *Kneeland* we know that the barge or hoy was a common carrier; and it is obvious that if in *Mors* v. *Slue* (1673), 1 Vent. 190, 238, the vessel had been a private one, instead of treating the case as identical with that of the common hoyman, the Chief Justice would have put it on the ground that all sea-going vessels were subject to the larger liability. But besides this, there is a circumstance which appears to have been overlooked, which seems decisive to shew that the ship must have been a general ship. It is mentioned in the report of Ventris, that the ship was a vessel of 150 tons burden, bound for Cadiz, and that the goods shipped by the plaintiff consisted of three trunks, containing 400 pairs of silk stockings and 174 pounds of silk. It seems idle to suppose that a ship of that size would have been hired on such a voyage for the

purpose of carrying the plaintiff's three trunks as her entire cargo. There seems, therefore, no reasonable doubt that the ship was a general ship. In like manner, in the case of *Dale* v. *Hall* (1750), 1 Wils. 281, although the declaration was not upon the custom of the realm, but upon the implied obligation to carry safely, it appearing that the defendant was a shipmaster or keelman who carried goods from port to port, the court decided in favour of the plaintiff, expressly on the liability of the defendant as a common carrier (though the latter was prepared to shew an absence of negligence on his part), on the ground that the allegation of the duty of a common carrier 'to carry safely' was equivalent to a declaration on the custom of the realm. In the subsequent case of *Barclay* v. *Cuculla y Gana* (1784), 3 Doug. 389, which was a case where, as in *Mors* v. *Slue* (1673), 1 Vent. 190, 238, goods had been forcibly taken by thieves from a ship lying in the Thames, on the objection being taken on behalf of the defendant that he was not charged in the declaration on the custom of the realm, while there was neither express undertaking nor negligence to make him liable otherwise, the answer of the court was 'that there was no question at the trial as to the ship being a general ship;' and Lord *Mansfield* adds that it was impossible to distinguish the case from that of a common carrier" (*Nugent* v. *Smith* (1876), 1 C. P. D. 423, at pp. 427, 428, 429, 430, 431, 432: *Cockburn*, C.J.).

Conveyance by Ships under Special Agreements.

"The law on the subject is laid down in the case of the *Liver Alkali Co.* v. *Johnson* (1874), L. R. 9 Ex. 338, decided in the Exchequer Chamber in the year 1874. In that case the action was brought against the defendant for not safely and securely carrying certain goods. The defendant was a barge owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini; but the customer fixed in each particular case the points of arrival and departure. Under these circumstances the Court of Exchequer Chamber held that the defendant in exercising this employment had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part. That case therefore was not a case of conveyance by general ships, but of conveyance under special agreements. *Blackburn*, J., in the course of his judgment, after referring to the history of the law relating to the liability of carriers, said, at p. 340: 'It is too late now to speculate on the propriety of this rule, we must treat it as firmly

established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability.' *Brett*, J., makes the distinction that, although in that case the defendant was not a common carrier, nevertheless he had undertaken all the liability of a common carrier. He says, at pp. 343, 344, 'He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier. The defendant in the present case, in my opinion, carried on his business like any other owner of sloops or vessels, and was not a common carrier, and was in no way liable as such. But I think that, by a recognised custom of England,—a custom adopted and recognised by the courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them—every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions.' I prefer of the two the language of *Blackburn*, J., although there is really no essential difference" (*Hill* v. *Scott*, [1895] 2 Q. B. 371, at pp. 375, 376: Lord *Russell of Killowen*, C.J.).

The Railway Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 86, *enables but does not oblige Railway Companies to be Carriers.*

"The Act (The Railway Clauses Act, 1845 (8 & 9 Vict. c. 20)) shows a right in the public to carry and convey goods as well as the company (Midland Railway), provided they do so according to the regulations of the company. Though that right has proved practically useless, the question is, what was the intention of the legislature by the clause referred to (s. 86)? And I think it shows that no obligation is cast on the company to undertake the duties of carriers altogether, and on every part of their line, but that they may carry some goods on one part of the line and not on others, and they may afterwards relinquish the business if they please; though it is not necessary to determine that point now. There is nothing which induces me to think that we ought to give a different construction to the 86th section, which in terms only enables, not obliges, the company to be carriers. Therefore, I think that the circumstance of their having undertaken to be carriers does not bind them to carry from or to each place on the

line, or every description of goods" (*Johnson* v. *Midland Rail. Co.* (1849), 4 Exch. 367 at p. 374 : *Parke*, B.).

See also *Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at pp. 188, 189 : *Lopes*, L.J., *post*, Section IV.—Common Law Contract of Carriage.

Railway Company's Liability not to Extend Further than that of a Common Carrier.

The Railway Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 89. Nothing in this or the special Act contained shall extend to charge or make liable the company further or in any other case than where, according to the laws of the realm, stage coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the company of any protection or privilege which common carriers or stage coach proprietors may be entitled to ; but, on the contrary, the company shall at all times be entitled to the benefit of every such protection and privilege.

SECTION III.

ROADWORTHINESS AND SEAWORTHINESS.

(*a*) *Roadworthiness*, p. 353.
(*b*) *Seaworthiness*, p. 355.

Roadworthiness of the Common Carrier's Vehicle, and Seaworthiness of the Common Carrier's Vessel.

Roadworthiness and seaworthiness are the very foundation and immediate substratum of the common law contract of carriage. There is, however, a great difference between the common law contract to carry *goods*, and the common law contract to carry *passengers*. The common carrier undertakes to carry *goods* safely and securely whatever happens, except the act of God, the queen's enemies, or inherent vice ; but he undertakes to carry *passengers* safely and securely, so far only as reasonable care and foresight can go. Therefore—

As to Passengers.

The *vehicle* must be in a reasonably fit and proper state as to repairs, equipment, and persons in charge thereof, and in all other respects sufficient to perform the journey and to encounter its ordinary dangers at the time of performing it.

The *vessel* must be seaworthy, *i.e.*, in a reasonably fit and proper state as to repairs, equipment and crew, and in all other respects sufficient to perform the voyage and to encounter its ordinary perils at the time of performing it.

Perhaps "wayworthiness" or "landworthiness" and "waterworthiness" would be more apposite terms to employ. We have the words way-bill, wayfarer, waylay, wayless, wayside, way-worn—applicable to rivers, canals and freshwater lakes. We have the words, why not, therefore, wayworthiness? *Sea*worthiness is scarcely water-borne, water-carriage, water-lines, water-logged, water-mark, water-tight, water-worn—why not, therefore, waterworthiness?

The word "landworthiness" was used by Lord *Ellenbrough* in *Israel* v. *Clark* (1803), 4 Esp. 259. See *post*, p. 354.

Difference between the Contract to carry Goods and the Contract to carry Passengers.

See also *post*, Section XIV.—Passengers, (b) Duty of Carriers to Passengers Imposed by Law.

1. In the case of *Christie* v. *Griggs* (1809), 2 Camp. 79, at p. 81, Sir *James Mansfield* said that there was a difference between a contract to carry goods, and a contract to carry passengers. For the goods, the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance.

2. "The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers . . . It is extremely doubtful whether such warranty [that the vehicle is roadworthy] can be predicated to exist in the contract of a common carrier of goods. His obligation is to carry and redeliver the goods in safety whatever happens; in the words of Lord *Holt*, 'he is bound to

answer for the goods at all events.' Again, 'The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the King:' and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and redelivered it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable 'at all events;' and it is unnecessary to inquire how that loss or damage arose" (*Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, at pp. 382, 383: *Montague Smith*, J., delivering the judgment of the Court of Exchequer Chamber (*Kelly*, C.B., *Byles*, *Keating*, and *M. Smith*, JJ., *Channell* and *Bramwell*, BB.)).

No Absolute Warranty of Seaworthiness in the Case of Passengers.

3. "Undoubtedly, the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear to be material to inquire when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon* v. *Mells* (1804), 5 East 428, it was no doubt stated by the Court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. . . . No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action on it" (*ibid.*, at pp. 390, 391).

(a) Roadworthiness.

What is Required of a Coach and its Driver. (1)

1. "The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when every thing has been done

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(1) "It is not essential (as in insurance cases) that the proximate cause shall alone be regarded. It is sufficient if an efficient cause of the thing complained of is found in some tortious act of the defendant. Here the accident is found to have been caused by the employment of horses unsuitable for the route they were placed on." *Per King*, J., in *Rainnie* v. *St. John*, 31 N. B. Reps. 582.

that human prudence can suggest for the security of the passengers, an accident may happen. The lights may, in a dark night, be obscured by fog; the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys. It is not his fault, if having exerted proper skill and care, he from accident gets off the road; and the proprietors are not answerable for what happens from his doing so" (*Crofts* v. *Waterhouse* (1825), 3 Bing. 319, at p. 321: *Best*, C.J.).

Loading a Vehicle beyond its Strength.

2. In *Israel* v. *Clark* (1803), 4 Esp. 259, Lord *Ellenborough* said, that it was by no means to be taken as a rule, because Mr. Gamon's Act allowed a certain number to ride on the roof; that the coach-owners were therefore entitled, at all events, to carry that number; if they carried more, they were liable to its penalties; but it had nothing to do with this question. They might not be entitled to carry so many: it depended upon the strength of the carriage. They were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established.

No Warranty against latent Defects.

3. "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation.

"The injury in the present case, appears to have been occasioned by an original defect of construction; and if the defendant were not responsible, a coach proprietor might buy ill-conditioned or unsafe vehicles, and his passengers be without remedy" (*Sharp* v. *Grey* (1833), 9 Bing. 457, at pp. 459, 460: *Alderson*, J.).

"The judgment of *Alderson*, J., [*supra*] is distinctly opposed to the notion of a warranty against latent and undiscoverable defects" (*Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, at p. 387: *Montague Smith*, J., delivering the judgment of the Court of Exchequer Chamber (*Kelly*, C.B., *Byles*, *Keating*, and *Montague Smith*, JJ., *Channell* and *Bramwell*, BB.)).

A Railway Carriage should be reasonably sufficient.

4. "I have only to add that I do not think that the duty to supply a seaworthy ship or a sufficient vehicle by land is equivalent to a duty to provide one perfect, and such as never can, without some extraordinary peril, break down, which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle which cannot be shown to arise from

some unusual accident. I had occasion, in the case of *Burges* v. *Wickham* (1863), 3 B. & S. 669, at p. 693, to consider what was the meaning of the term 'seaworthy,' as applied to a ship; and I see no reason to change the opinion which I then expressed, that it meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and, applying a similar principle to a land journey, I agree with what I understand to have been the direction of *Erle*, C.J., in *Ford* v. *London and South Western Rail. Co.* (1862), 2 F. & F. 730, that the railway company are not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand the obligation to be, to furnish not a perfect vehicle, but one reasonably sufficient" (*Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412, at pp. 440, 441: *Blackburn*, J.; affirmed L. R. 4 Q. B. 379).

Public Carriage, no absolute Warranty of the Fitness of Vehicle and Horses.

5. "It is quite true that the defendants do not absolutely warrant the safety of their passengers, or the absolute fitness of their carriages and horses; but that they are only bound to use reasonable care to provide for the passengers' safety. It is also true that the mere fact of the happening of an accident is not, as a general rule, even *primâ facie* evidence of negligence. But, if the cause of the accident be shown, it may or may not, according to circumstances, be evidence for the jury. In the case of a public carriage, the owner is bound to provide proper horses and such as will not unduly endanger his passengers. In the event of an accident arising from their unfitness, it is not necessary to shew that the owner was aware of such unfitness" (*Simson* v. *London General Omnibus Co.* (1873), L. R. 8 C. P. 390, at pp. 392, 393: *Bovill*, C.J.).

(b) Seaworthiness.

1. "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of

sound policy and public convenience requires it should be so" (*Lyon* v. *Mells* (1804), 5 East 428, at p. 437: Lord *Ellenborough*, C.J.). (2)

2. "We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language, is seaworthy, that is fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. For this proposition we have the high authority of Lord *Tenterden*, who lays it down in the first edition of his book, published in 1802, and for the correctness of which he vouches Emerigon, Roccus, and other eminent writers and commentators upon the subject; Abbot on Shipping, 1st ed., p. 146. The accuracy of the proposition thus stated in 1802 has not, that we are aware of, ever been brought into question in any of the subsequent editions, or of the numerous text books since published on the subject. In further support of the implication of such a warranty, we have the authority of Lord *Ellenborough*, who in the case of *Lyon* v. *Mells* (1804), 5 East 428, lays it down that it is a part of the contract on the part of a carrier or lighterman implied by law, that his vessel is tight and fit for the purpose or employment for which he offers it" (*Kopitoff* v. *Wilson* (1876), 1 Q. B. D. 377, at pp. 380, 381: *Field*, J., delivering the judgment of the Court (*Blackburn*, *Quain*, and *Field*, JJ.)).

3. "I take it my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of Lord *Tenterden*, as early as the first edition of Abbott on Shipping, at the very beginning of this century, of Lord *Ellenborough*, following him, and of Baron *Parke*, also, in the case of *Gibson* v. *Small* (1853), 4 H. L. C. 353, without seeing that

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(2) In a voyage policy the implied warranty of seaworthiness is satisfied by showing that the vessel was seaworthy when she sailed (*Morrison* v. *Nova Scotia Marine*, *post*, 358).

these three great masters of marine law all concurred in that; and their opinions are spread over a period of about forty or fifty years. I think therefore, that it may be fairly said that it is clear that there is such a warranty or such an obligation in the case of a contract to carry on board ship" (*Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72, at p. 86: Lord *Blackburn*, cited by *Kay*, L.J., in *Owners of Cargo on Ship "Maori King"* v. *Hughes*, [1895] 2 Q. B. 550, at p. 558).

4. "I have always understood the result of the cases from *Lyon* v. *Mells* (1804), 5 East 428 to *Kopitoff* v. *Wilson* (1876), 1 Q. B. D. 377, to be that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72" (*The Glenfruin* (1885), 10 P. D. 103, at p. 108: *Butt*, J.). (3)

Bill of Lading exempting Owner from Liability if he exercise due Diligence to make his Vessel in all respects Seaworthy.

"What is the meaning of the expression 'If the owner shall exercise due diligence to make the vessel in all respects seaworthy'? Does it mean by himself, with his own hands and eyes? If that be the meaning of the clause, it could hardly be applied in one case out of fifty, for evidently the shipowner is not upon the spot to see to the matter. In my opinion it does not mean by himself personally, but by himself and his agents; so that if by himself and his agents he exercises due diligence to make the vessel seaworthy, then he is not to be liable for loss or damage resulting afterwards from faults or errors in navigation or in the management of the vessel. To get himself within the exemption which is in his favour the shipowner must make out that he has by himself or his agents exercised the due diligence which is required" (*Dobell and Co.* v. *Steamship Rossmore Company*, [1895] 2 Q. B. 408, at p. 417: A. L. *Smith*, L.J.).

Meaning of "Seaworthiness" in a Policy of Insurance.

1. "Some propositions in the doctrine of the implied warranty of seaworthiness, which form a part of every contract of marine insurance on voyages (for to time-policies it does not apply) are perfectly settled. (4) They are laid down in the case of

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(3) *Chaffey* v. *Schooley*, 40 U. C. Q. B. 165, *ante*, p. 259.

(4) The fact that no explanation can be given for the loss of a vessel will not be enough to establish unseaworthiness if there is evidence from which it

Dixon v. *Sadler* (1839), 5 M. & W. 405, in which I gave the judgment of the Court of Exchequer, with the concurrence of my brethren, founded on the principle laid down in several previous cases. *Busk* v. *Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73; *Walker* v. *Maitland* (1821), 5 B. & Ald. 171; *Holdsworth* v. *Wise* (1828), 7 B. & C. 794; *Bishop* v. *Pentland* (1827), *ib.* 219; *Shore* v. *Bentall* (1828), *ib.* 798, note. 'There is an implied warranty in every insurance of a ship, that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to perform the voyage insured, and to encounter the ordinary perils at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it was a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at each stage of the navigation in which the loss happens properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on the policy, when the loss has been immediately occasioned by the perils insured against' (*Dixon* v. *Sadler* (1839), 5 M. & W. 405 at p. 414), and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of assurance. Our law differs in this respect from the law of America, where the implied warranty extends to the conduct of the owner and crew during the whole voyage" (*Biccard* v. *Shepherd* (1861), 14 Moo. P. C. 471, at pp. 493, 494: Lord *Wensleydale*). The above principle has been sanctioned by the cases of *The Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L. R. 3 P. C. 234, at p. 241; *Thin* v. *Richards and Co.*, [1892] 2 Q. B. 141, at p. 143; and *The Vortigen*, [1899] P. 140, at p. 156.

2. "The word 'seaworthy' is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter.

"Baron *Parke*, in the case of *Dixon* v. *Sadler* (1839), 5 M. & W. 405 at p. 414, defined the seaworthiness of a vessel thus: 'that she

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may be reasonably inferred that the vessel was seaworthy at the outset (*Morrison* v. *Nova Scotia Marine*, 28 N. S. Reps. 346; see also *Coons* v. *Ætna Insurance Co.*, 18 U. C. C. P. 305, and *Myles* v. *Montreal*, 20 U. C. C. P. 283)."

shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage.' Other definitions which have been given do not, I think, substantially differ from this, and I think when so well known a word is used in the statute of 1876 [Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80)] it must have its well-established meaning attached to it" (*Hedley* v. *Pinkney and Sons Steamship Co.*, [1894] A. C. 222, at p. 227 : Lord *Herschell*, L.C.).

Sending unseaworthy ships to sea may be a misdemeanour (see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 457).

SECTION IV.

COMMON LAW CONTRACT OF CARRIAGE.

(*a*) *General Obligation of the Common Carrier to Carry, and his Right of Refusal to Carry in certain instances*, p. 359.
(*b*) *Receipt of the Goods and Chattels, and Payment of the Remuneration*, p. 361.
(*c*) *Delivery by the Customer to the Carrier*, p. 364.
(*d*) *Receipt by Common Carrier of Goods to be Carried beyond the Limits within which he Carries*, p. 369.

Having dealt in the last section with roadworthiness and seaworthiness of the common carrier's vehicle or vessel which, as has been said by Lord *Ellenborough* in *Lyon* v. *Mells* (1804), 5 East, 428 at p. 437, *ante*, p. 356, are the very foundation and immediate substratum of the common law contract, we now come to the superstructure of that contract.

Of the common law contract of carriage there are four main branches, namely :—

(*a*) General Obligation of the Common Carrier to Carry, and his Right of Refusal to Carry in certain instances.

(*b*) Receipt of the Goods and Chattels, and Payment of the Remuneration.

(*c*) Delivery by the Customer to the Carrier.

(*d*) Receipt by Common Carrier of Goods to be Carried beyond the Limits within which he Carries.

(a) General Obligation of the Common Carrier to Carry, and his Right of Refusal to Carry in certain instances.

A common carrier, by reason of his exercising a public trade, is bound by the custom of the realm, *i.e.*, by the common law, to carry all goods presented to him for the purpose, which are

such as he professes to carry, provided he has accommodation for them and a reasonable tender of proper remuneration is made. He is liable to an action if he refuses to receive the goods without reasonable excuse, *e.g.*, if the owner of the goods will not tell him what his goods are, and what they are worth. See *post*, Section V. —Duty and Responsibility of Common Carriers.

The cases following, which cover a period of just two centuries, establish the general obligation above mentioned :

1. Action on the case, for that whereas the defendant is a common carrier from London to Lymington, *et abinde retrorsum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire, and held by *Jefferies*, C.J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

NOTE.—That it was alleged and proved that he had convenience to carry the same ; and the plaintiff had a verdict (*Jackson* v. *Rogers* (1695), Show. p. 554, case 330).

2. " Most certainly, every common carrier is bound only to carry goods of that description which his public calling requires him to carry. That is established by the case of *Johnson* v. *The Midland Rail. Co.* (1849), 4 Ex. 367 " (*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, at p. 712 : *Parke*, B.). (4)

3. " If a person chooses to profess to be a common carrier, the law creates a duty to receive things brought for carriage, and he may be liable *ex delicto* for a refusal to receive (*Pickford* v. *Grand Junction Rail. Co.* (1841), 8 M. & W. 372)" (*M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327, at p. 336 : *Erle*, J.).

4. " He (the carrier) was [at the common law] also bound to receive goods tendered to him for carriage, and was liable to an action if he refused to receive them without reasonable excuse ; and such an action may still be maintained (*Crouch* v. *London and North Western Rail. Co.* (1854), 14 C. B. 255)" (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas., 473, at p. 493 : *Blackburn*, J.).

5. " The obligation which the common law imposed upon him [a common carrier] was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing ; and if the carrier refused to accept

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(4) *Leonard* v. *American Express Co.*, 26 U. C. Q. B. 537.

such goods an action lay against him for so refusing" (*Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at p. 237 : *Blackburn*, J.).

6. "Suppose that an intimation is made to the railway company, such as Mr. Field contended, this amounted to, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. . . . It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid" (*Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131, at pp. 136, 137 : *Kelly*, C.B.).

Railway Companies.

7. "In 1845 the Railway Clauses Act [8 & 9 Vict. c. 20] was passed. Section 86 of that Act is permissive, and railway companies are not as such bound to be carriers and s. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854, railway companies, unless compelled by some statute, could have refused to carry dogs or any other traffic which they did not profess to carry and did not generally carry, as common carriers, and no action would lie to compel them" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at pp. 188, 189 : *Lopes*, L.J.).

(b) Receipt of the Goods and Chattels, and Payment of the Remuneration.

The receipt of the goods and the payment of, or the readiness to pay, a reasonable sum for their carriage are contemporaneous acts.

Enquiry as to Cost.

"If a person goes to the office of a carrier, and asks what a thing will be done for, and he is told by a clerk or servant, who is transacting the business there, that it will be done for a certain sum, the master can charge no more" (*Winkfield* v. *Packington* (1827), 2 C. & P. 599, at p. 600 : Lord *Tenterden*, C.J.).

Payment before Receipt.

1. "The carrier is entitled to have this [his] reward paid to him before he takes the package into his custody" (*Batson* v. *Donovan* (1820), 4 B. & Ald. 21, at p. 28 : *Best*, J.).

A Strictly Legal Tender of the Hire is Unnecessary. It is Sufficient if the Customer Pay, or be ready to Pay the Hire when the Carrier is ready to Carry.

2. "It was admitted on the argument in this case, that the defendants, in their capacity of common carriers, are bound to carry all goods presented to them for the purpose, but it was contended that that is only on being paid in ready money: and the simple question is, whether, in order to support an action against them for refusing to carry, on the offer of a reasonable sum, it is necessary that the plaintiffs should have made what the law terms a strict tender, in the form required by law. Now the Court think that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it, in which case the tender stands in the place of payment, and is in fact a payment, so far as it is in the power of the party tendering to make it one, but which remains incomplete only because the party to whom the money is offered refuses to accept it. Such a tender we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods, and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods. The case of *Rawson* v. *Johnson* (1801), 1 East 203 and the other cases cited by Mr. Martin [*Wilks* v. *Atkinson* (1815), 1 Mars. 412; *Levy* v. *Lord Herbert* (1817), 7 Taunt. 314; *Waterhouse* v. *Skinner* (1801), 3 Bos. & P. 447], clearly shew, that whenever a duty is cast on a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty. Here the acts to be done by the plaintiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs, until the carrier receives the goods, which he is bound to carry" (*Pickford* v. *Grand Junction Rail. Co.* (1841), 8 M. & W. 372, at pp. 377, 378: *Parke*, B.).

3. "Being entitled by common law to insist on the full price of carriage being paid beforehand, he [the carrier] may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own" (*Wyld* v. *Pickford* (1841), 8 M. & W. 443, at p. 458: *Parke*, B.).

Tender of a Reasonable Sum.

4. "If it had been the intention of the plaintiff to make the defendants liable as common carriers, he ought to have tendered them a reasonable sum for the carriage of the chattel, and, upon their refusal to carry, to have brought his action for not carrying" (*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, at p. 712 : *Parke*, B.).

5. "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case [of an innkeeper] from the case of a carrier" (*Morgan* v. *Ravey* (January 11th, 1861), 6 H. & N. 265, at p. 276 : *Pollock*, C.B.).

6 "I take the law with respect to the obligations of common carriers to be clear. Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition" (*Garton* v. *Bristol and Exeter Rail. Co.* (May 3rd, 1861), 1 B. & S. 112, at p. 162 : *Cockburn*, C.J.).

As to Carriers treating Customers alike.

At common law a common carrier need not treat all his customers alike in the matter of charges. He may charge less than a reasonable remuneration, or nothing at all.

If the customer, in order to induce the carrier to perform his duty, pays, under protest, a larger sum than is reasonable, he can recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

"At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing ; and if the carrier refused to accept such goods an action lay against him for so refusing ; and if the customer, in order to

induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

"But the fact that the carrier charged others less, though it was evidence to show that the charge was reasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable: see *per Byles*, J. in *Baxendale* v. *Eastern Counties Rail. Co.* (1858), 4 C. B. (N.S.) 63 at p. 84 and *per Willes*, J. in *Branley* v. *South-Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 63 at p. 75" (*Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at p. 237: *Blackburn*, J.).

Alternative Offer.

"A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement a reduction in the price below that which would be a reasonable remuneration, for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common law liability, a condition thus offered may be just and reasonable: *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), L. R. 8 App. Cas. 703. These are no doubt cases where the railway companies are carrying as common carriers, but the same principle applies" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at p. 192: *Lopes*, L.J.).

Quantum meruit—where no Particular Agreement.

Case against the defendant, a *common carrier*, for a box delivered to him to be carried to B. and lost by negligence. If there was no particular agreement, the carrier may have a *quantum meruit* for his hire; and he is, therefore, as chargeable for the loss of the goods in the one case as the other (*Bastard* v. *Bastard* (1691), 2 Show. 81).

(c) Delivery by the Customer to the Carrier.

See also *ante*, p. 53, Chapter II.—Deposits; Section II., (e) Delivery of deposit, and *ante*, p. 143, Chapter V.—Pledges, Section II., (d) Delivery.

We have just seen that the delivery of the goods and chattels to the carrier, and the payment of, or the readiness to pay, a reasonable sum for their carriage, are contemporaneous acts: we next have

to ascertain what is a sufficient delivery to the carrier, to render him responsible for the security of the goods and chattels. (5)

The following cases are examples of what is and what is not a sufficient delivery.

Delivery of a Dog Visibly Insecurely Fastened.

1. "In point of law the defendant had acknowledged the delivery of the dog to him by giving a receipt. The case was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. The present case was not of great importance; but the same point might occur upon a question of the greatest magnitude. After a complete delivery to the defendant, he became responsible for the security of the dog, the property then remained at the risk of the defendant, and he was bound to lock him up, or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for its security" (*Stuart* v. *Crawley* (1818), 2 Stark. 323, at p. 324: Lord *Ellenborough*).

Delivery of Dog without Notice that it was Insecurely Fastened.

2. "That case [*Stuart* v. *Crawley* (1818), 2 Stark. 323] is obviously different from this. Here, the greyhound when delivered

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(5) One Eyre was going from Cobourg to Toronto, and plaintiff handed him two sealed letters, requesting him to carry them for him to Toronto as a favour. One of these letters contained a promissory note made by defendant, and was addressed to Buchanan & Co. Eyre knew nothing of the contents, and put the letters under the string which bound up a parcel which he was taking with him. In the hurry of going on board the steamer he left the parcel behind, and recollecting it, he directed his son to forward the parcel to him (Eyre) by the stage coach. This was done, and the parcel and letters were wrapped in brown paper tied with a string not sealed, and with nothing to denote that it contained anything of great value or any letters. It was given to a person in the stage office who usually booked passengers and parcels for the stage. On the journey to Toronto, the coach was set fast in a mudhole, and during the delay occasioned, the parcel was stolen:—*Held per curiam*, that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable under the facts in this case for the loss of a letter containing a promissory note. *Per Robinson*, C.J.: There was no implied contract between plaintiff and defendant. To sustain this action. the defendant must be held liable as a common carrier, not of goods merely, but of letters, and liable without showing that any letter had been given to him to carry, and without any legal right to charge for carriage of letters, or any usage shown to receive a reward for doing it, whereas the very strict liability of common carriers of goods arises by reason of the reward which they are entitled to receive (*Holman* v. *Weller*, 8 U. C. Q. B. 202).

to the guard had a leathern collar on with a strap attached to it, indicating that the strap was the thing by which she was to be secured. If it was negligence on the part of the guard to fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present,—first, that there the defendant was a common carrier, and here the defendants are not,—and, secondly, that, when the dog was delivered to the defendants' servant, he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz. by a collar and strap" (*Richardson* v. *North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75, at p. 82: *Willes*, J., delivering the judgment of the court (*M. Smith* and *Willes*, JJ.)).

Booking Offices.

1. Defendant kept a booking-office in Piccadilly, at which parcels were booked for a considerable number of coaches and waggons: a box was booked there, to go by the Windsor waggon. It was proved, that the defendant's name was painted over the door of the office, and that on a board at the side of the door was painted the words, "conveyances to all parts of the world," and this was followed by a list of names, including Windsor. The box was never received at the place to which it was addressed.

Lord *Tenterden*, C.J.: There is no proof that the defendant is a carrier (*Upston* v. *Slark* (1827), 2 C. & P. 598).

2. "The defendant was not a carrier, but keeper of a booking-office. His contract was, to take care of the box, that it might be forwarded, that is, that it might be delivered to some carrier, to be conveyed to its destination. To shew a breach of that undertaking by the defendant, it should have been proved by direct evidence that the box was taken away while in the booking-office, and lost, or that it was never delivered to any carrier. No such evidence was given. All the proof was, that it did not arrive at its destination: but, in this case, non-delivery to the consignee was not sufficient. The decision in *Griffiths* v. *Lee* (1823), 1 C. & P. 110, is correct, as applied to the case of a carrier, but not to that of a book-keeper" (*Gilbart* v. *Dale* (1836), 5 Ad. & Ell. 543, at p. 546: *Patteson*, J.).

3. "In the case of a carrier, the law presumes that he will do his duty; and a plaintiff, who charges him with the breach of it, must give some evidence of non-performance. The fact, that the goods have not reached the consignee, is such evidence against the carrier, and calls upon him to discharge himself by other proof

So in the case of the keeper of a booking-office; to call on him for an answer to such a charge as the present [loss of the goods], some evidence must be given of the non-performance of his undertaking: but that is not done by merely shewing non-delivery of the goods *to the consignee*. Suppose goods were left with a carrier to be taken by him to York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?" (*ibid.*, at p. 547: *Coleridge*, J.).

4. "With respect to the case referred to [*Gilbart* v. *Dale* (1836), 5 Ad. & Ell. 543] of the booking-office in London, it only goes to show that when persons take charge of parcels at such an office, they merely make themselves agents to book for the stage-coach. You go to the office and book a parcel, the effect of this is to make the booker your agent, instead of going to the coach-office yourself; and so that he sends the parcel to the proper coach-office, and once delivers it there, he has discharged himself; he has nothing to do with the *carriage* of the goods" (*Muschamp* v. *Lancaster and Preston Junction Rail. Co.* (1841), 8 M. & W. 421, at p. 428: Lord *Abinger*, C.B.).

Carrier Directing Goods to be Sent to a Booking Office.

5. "If a carrier has directed goods to be sent to a particular place, I think that the party sending them has, in point of law, a remedy against him for any misconduct on the part of the booking office keeper" (*Colepepper* v. *Good* (1832), 5 C. & P. 380, at p. 383: *Gaselee*, J., in summing up).

Carriers' Agents.

1. "A carrier receiving goods undertakes to carry them to the party whose address is upon them; the fact of their coming to him through a series of agents does not prevent his being liable to the sender. He cannot throw back the liability upon the earliest agent" (*Syms* v. *Chaplin* (1836), 5 Ad. & Ell. 634, at p. 642: Lord *Denman*, C.J.). (6)

2. Plaintiff was a publisher of prints in London; he had an agent

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(6) Plaintiff delivered certain goods to the Grand Trunk Railway Company for carriage to Winnipeg. Defendants, in the course of transit, received the goods and were paid freight charge over their line. Defendants delivered the goods at Winnipeg to a cartage company to be delivered to plaintiff, but some of them were not so delivered:—*Held*, that defendants were liable (*Roach* v. *Canadian Pacific Railway*, 1 Man. L. R. 158; *Leslie* v. *Canada Central Railway*, 44 U. C. Q. B. 21).

at Bristol named Leese, who wished to send the prints in question, which belonged to the plaintiff, to London by a van, of which the defendants were the proprietors. Mr. Leese went to the booking-office of the defendants at Bristol and desired that the box, containing the prints, should be sent for, which it was, and a porter belonging to the defendants' booking-office fetched it from Mr. Leese's house to the office, where it was put into the defendants' van. After the box had arrived in London, it was placed in a print-room of the plaintiff, and on the next day it was found that the prints had got wet and were damaged.

"It appears that Mr. Leese, the plaintiff's agent, went to the office and asked to have them sent for, which was done, and I think that for this purpose the plaintiff's agent made the defendants' servant his servant, and that for this purpose we must take it that the goods were delivered by the plaintiff at the defendants' booking-office" (*Boys* v. *Pink* (1838), 8 C. & P. 361, at p. 363: Lord *Denman*, C.J., in summing up).

3. The plaintiff, staying at the Horse-shoe Inn, at the Stones-End, in the borough of Southwark, wished to forward her luggage to Lindfield. She had sent to the Talbot Inn, in the Borough, from which the van of the defendant, who was a Lindfield carrier, started, to desire that the van might be brought to call for her luggage at the Horse-shoe Inn. The defendant's van, driven by a servant of the defendant named Allen, was brought to the door of the Horse-shoe Inn, when the luggage of the plaintiff was put into the van, from which it was afterwards lost while the van was on its way to Lindfield, and while the driver of the van was asleep.

"If you are satisfied that this luggage was delivered to the defendant's servant, as has been proved, I am of opinion that the defendant is just as much liable in this action as if he had taken up these goods at the Talbot instead of having taken them up at the Horse-shoe" (*Davey* v. *Mason* (1841), Car. & M. 45, at p. 50: Lord *Abinger*, C.B., in summing up). (7)

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(7) Plaintiff sent by S. a box of goods to defendants' station at W. to be carried to Y. at P. S. saw several men working at defendants' freight shed and told one of them he had brought a box for Y.; the man told him "to bring it in and put it there," and S. put it where he was told. He got no receipt. The box was lost. Plaintiff then went to the station at W. and saw the man already referred to, who admitted that he got the box, but could not say what he had done with it:—*Held*, that whether the goods were to be carried at the risk of the consignor or of the consignee was a question for the jury, and the court would not disturb their verdict, and—*Held*, that the admission of the man whom plaintiff saw was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be non-suited (*Young* v. *Canadian and Pacific Railway*, 1 Man. L. R. 205).

(d) Receipt by Common Carrier of Goods to be Carried Beyond the Limits within which he Carries.

The fact of a common carrier receiving goods to be carried directed to a place beyond the limits within which he carries and charging one sum for the whole distance is *primâ facie* evidence of a contract on his part to carry the goods to that place. The carriers beyond such limits act on behalf of the common carrier who receives the goods and may be liable for the loss of or injury to the goods. (7A)

See also *post*, Section XIV.—Passengers, (a) Passenger's Contract with Carrier, and (c) Special Contract.

1. Where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier (*Muschamp* v. *The Lancaster and Preston Junction Rail. Co.* (1841), 8 M. & W. 421, at p. 423: *per Rolfe*, B., in summing up).

2. "What I told the jury was only this, that if a party brings a parcel to a railway station, which in this respect is just the same as a coach-office, knowing at the time that the company only carry to a particular place, and if the railway company receive and book it to another place to which it is directed, *primâ facie* they undertake to carry it to that other place. That was my view at the trial, and nothing has occurred to alter my opinion" (*ibid.*, at p. 429: *Rolfe*, B.).

3. "It appears that the defendants carry to Wolverhampton by two routes: they carry goods from Penzance to Hayle and there deliver them on board steam-packets for conveyance to Bristol, from whence they are taken by railway to Wolverhampton: they also carry parcels along their line to Truro and there deliver them to other carriers who take them to Plymouth, from whence they are forwarded by railway to Wolverhampton. . . . There is nothing to show that the responsibility of the defendants, as common carriers, ceased when the parcel arrived at Hayle. In *Muschamp* v. *The Lancaster and Preston Rail. Co.* (1841), 8 M. & W. 421, the question was properly left to the jury. Indeed it would be most inconvenient, if when a parcel is sent

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(7A) *Roach* v. *Canadian Pacific Rail. Co.*, 1 Man. 158; *Leslie* v. *Canada Central Rail. Co.*, 44 U. C. Q. B. 21.

from London to Glasgow (when it is carried on four different railways), the owner was obliged to find out at what particular part of the journey it was lost. It is said that the company did not profess to carry the whole distance; but if a person delivers to a railway company a parcel directed to a certain place, one sum being charged for the whole carriage, and the company accept it, that is a holding out by them to the person who brought the parcel that they would carry it as directed; and it is no answer to say that they have never carried to that place before. Then it is said that there is no evidence of the payment of the carriage; but we must infer that when the parcel arrived at Wolverhampton the plaintiff would pay the whole amount. The case is the same as *Muschamp* v. *The Lancaster and Preston Rail. Co.* (1841), 8 M. & W. 421, and it makes no difference whether the carriage is paid at the beginning or at the end of the journey. It is conceded that *Muschamp* v. *The Lancaster and Preston Rail. Co.* (1841), 8 M. & W. 421, was well decided, but it is said that this case is distinguishable, because for a certain distance the sea intervenes; but all railway companies strive to extend their traffic, and it would be strange if a company who undertook to carry goods from London to Paris, were not liable for a loss at Boulogne, because their line did not extend beyond Dover or Folkestone. The same may be said of the carriage of goods from London to Dublin, or from London to Barton and from thence across the river Humber to Hull. There is nothing unreasonable, so as to lead to the conclusion that the company did not contract to carry by sea. I think that in this case the contract was to carry the entire distance, there being nothing in the conduct of the parties to show that the company were mere agents, beyond their line, to forward the parcels" (*Wilby* v. *West Cornwall Rail. Co.* (1858), 2 H. & N. 703, at pp. 709, 710, 711: *Watson*, B.). (8)

The common carriers who receive the goods may be the agents of the carriers who deliver the goods.

Agency for Carriage between Railway Companies.

Plaintiff took a cow to the Great Northern Railway station at Doncaster, and there booked her for Sheffield by the Manchester, Sheffield and Lincolnshire Railway (the defendants). It was contended upon the part of the defendants, that the contract for the carriage of the cow was with the Great Northern Railway Company, and not with them.

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(8) *Hately* v. *Merchants*, 12 O. A. R. 201.

"At the conclusion of the argument we declared our opinion, that the action was rightly brought against the defendants, inasmuch as, if the provisions of the agreement of the 17th of June 1857, did not constitute an actual partnership between the respective companies as to all matters embraced by it, still they came within the rule expressed by Lord *Cranworth* in *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268 at p. 306: 'The real ground of the liability is, that the trade has been carried on by persons acting on his [the defendant's] behalf'; and *per* Lord *Wensleydale* to the same effect in the same case (at p. 315). In our opinion, the Great Northern Railway Company became, by virtue of their agreement with the defendants, the agents of the latter to make the contract for the carriage of the cow with the plaintiff" (*Gill* v. *Manchester Rail. Co.* (1873), L. R. 8 Q. B. 186, at p. 191: *Mellor*, J.). (9)

Contract Made in one Country and Performed in Another.

"The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability" (*The Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865), 3 Moore P. C. Cas. (N.S.) 272, at pp. 290, 291: *Turner*, L.J., pronouncing the judgment of the Privy Council).

"As a general rule, the *lex loci contractus* governs in deciding whether there was illegality in the contract" (*Branley* v. *The South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 63, at p. 72: *Erle*, C.J.).

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(9) "Under English law a company receiving goods for carriage to a point beyond its line *primâ facie* contracts for the entire carriage. But it may limit its responsibility to acts or defaults occurring on its own line, and when this is done it and each carrier in succession comes under an obligation to deliver goods so received to the next carrier": *per King*, J. (*The Northern Pacific Rail. Co.* v. *Grant*, 24 S. C. R. 548).

SECTION V.

DUTY AND RESPONSIBILITY OF COMMON CARRIERS.

In the absence of any exemption by statute, express contract or special notice brought home to the customer, or on the ground of fraud, a carrier by land or water is, by the custom of the realm, *i.e.*, by the common law, an insurer of the goods and chattels he carries for every accident (including accidental fire and irresistible force) except by the act of God, the Queen's enemies, or inherent vice. (10)

See *ante*, p. 27, Chapter I.—Introductory; Section IV.—Inevitable Accident, p. 28; (a) Act of God, p. 29; (b) Irresistible Force.

See also, *post*, Section XI.—End of Transit, (a) Delivery of Goods by Carrier.

1. "As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a *delivery* to one *that exercises a public employment*, or a delivery to *a private person*. First, if it be to *a person of the first sort*, and he is to have a *reward, he is bound to answer for the goods at all events*. And this is the case of the common carrier, common hoyman, master of a ship, etc. which case of a master of a ship was first adjudged 26 [*qu.* 24 & 25] Car. 2, in the case of *Mors* v. *Slue* (1673), Raym. 220; 1 Vent. 190, 238. (11) The law charges this person thus entrusted

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(10) Common carriers are liable by common law for the safety of goods entrusted to them for carriage, against all events but the acts of God, *i.e.*, storms, tempests, and inevitable accidents,—and the Queen's enemies. The Dominion Act (37 Vict. c. 25) has limited their liability. It declared (*inter alia*) that they shall not be liable for the loss of, or damage to, goods entrusted to them for conveyance when the loss or damage happens without their actual fault or privity, or the fault or neglect of their servants, agents or employees, nor when the loss or damage happens by reason of fire or the dangers of navigation. According to the majority of judges in the Supreme Court of New Brunswick, this statute has not changed the onus of proof in actions against carriers for loss of goods. The plaintiff is not therefore required to give affirmative evidence of negligence, and the defendant, in order to excuse himself, must prove that the loss happened without any negligence on his part (*Small* v. *Belyia*, 24 S. C. N. B. 16).

(11) In a case of collision it appeared that both vessels were carrying the lights prescribed by the 14 & 15 Vict. c. 126, although that Act had been repealed three years before by the 22 Vict. c. 19, which required other lights, and in different places:—*Held*, that as the error was common, and neither therefore could have been misled by it, the case must be treated as if both were carrying the proper lights. *Held also*, that the owner of the vessel not being in fault might recover the value of the goods on board not owned by

to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing ; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point" (*Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at pp. 917, 918 : *Holt*, C.J.).

Reason for Common Law Responsibility.

2. The defendant was a common carrier from London to Shaftesbury.

"The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back, that there are events for which the carrier is liable *independent of his contract.* (12) By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law ; a carrier is in the nature of an *insurer.* It is laid down that he is liable for every accident, except by the act of God, or the King's enemies.

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him, but in his custody as a carrier. *Per Wilson*, J. : It is well settled that a gratuitous bailee may maintain an action for a trespass, or an injury done to the property while in his bailment ; there is no distinction between a bailee by sea and a bailee by land. *Per Hagarty*, J. : An action always lay, at common law, on the part of the owners of goods lost or damaged by collision against the owners of the wrong-doing vessel. The practice seems to be for the owners of the goods to make their own claim for redress against the offending vessel. The carriers are generally protected by their bills of lading against the freighters ; but in the absence of any proof as to the nature of the carrier's liability, or the intention of such liability, the question to be determined is, Has the carrier such a property in the goods as to entitle him to recover? I do not see my way to any other conclusion on this evidence,—that the plaintiff had such a possession and special property in the wood as to entitle him to recover its value against a wrongdoer (*Irvine* v. *Hagarman*, 22 U. C. Q. B. 545).

(12) The statute 26 Geo. 3 c. 86, s. 2, which enacts "that no owner or owners of any ship or vessel should be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage which may happen by reason or means of any fire on board vessel," is in force in Upper Canada, and exonerated defendant (a carrier) from his promise to deliver flour by reason of accidental fire (*Torrance* v. *Smith*, 3 U. C. C. P. 411).

Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; everything, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force came to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident" (*Forward* v. *Pittard* (1785), 1 T. R. 27, at pp. 33, 34: Lord *Mansfield*). (13)

Canadian Cases.

(13) When a vessel carrying goods is stranded and lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, and the owners of such cargo will be liable for any extraordinary expenditure incurred in addition to the freight, and for such the carriers have a lien upon the goods for it (*Rogers* v. *Hooker et al*, 15 U. C. Q. B. 63). The expression of opinion by *Robinson*, C.J., in *Rogers* v. *Hooker*, must be taken as qualified by cases subsequently decided by the Privy Council (*per Harrison*, C.J., in *Gurney* v. *McKay*, 37 U. C. Q. B. 336).

The owners of ships which are engaged as general traders are liable as common carriers, equally with those whose vessels only carry goods between certain named places (*Hearle* v. *Ross*, 15 U. C. Q. B. 259).

If a ship be disabled by excepted perils from completing the voyage, the shipowner does not necessarily lose the benefit of his contract, but may forward the goods by some other means to the place of destination, and thus earn the agreed freight, but the option of reshipping must be exercised in a reasonable time. The plaintiff in December chartered the "Claribel" belonging to defendant to carry a mixed cargo of potatoes from Charlottetown to Bermuda, for a lump freight. The vessel soon after sailing got on a reef, and had to be towed back. The defendant refused to tranship the goods. The charterer demanded his goods, which was refused unless full freight paid, and some of the cargo was sold. In the spring the vessel was repaired, and sailed with balance of cargo. Action was brought by charterer for demurrage, and it was held that he was entitled to recover. *Per King*, J.: "When cargo is shipped, shipowner has a lien upon it from that time for the freight which he is proceeding to earn. So long as he is proceeding to earn the freight and retain possession, he is entitled to the possession. But if for any reason the contract comes to an end, the right ceases, and if he in terms or in effect declines to proceed, the other

3. "The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill founded is immaterial here) is to prevent fraud" (*Garside* v. *The Proprietors of the Trent Navigation* (1792), 4 T. R. 581, at p. 582: Lord *Kenyon*, C.J.).

See also *Hyde* v. *The Trent and Mersey Navigation Co.* (1793), 5 T. R. 389; and *Gatliffe* v. *Bourne* (1838), 4 Bing. N. C. 314.

4. "By the common law of the realm a carrier is an insurer; a responsibility originally rendered necessary by the habits which carriers had in old times of leaguing with thieves; and though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against" (*Brooke* v. *Pickwick* (1827), 4 Bing. 218, at pp. 222, 223: *Best*, C.J.).

5. "Now, a common carrier is in the nature of an insurer, and if he carries without any qualification of his liability, he becomes an insurer against all but fire [*qu.* only if caused by the act of God], tempest, and the King's enemies, and he insures against thieves, and the frauds of his own servants" (*Brind* v. *Dale* (1837), 8 C. & P. 207, at p. 211: Lord *Abinger*, C.B., in summing up).

6. "By the common law of England a person who expressly contracts absolutely to do a thing, not naturally impossible is not excused for non-performance because of being prevented by the act of God, or the King's enemies [*Paradine* v. *Jane* (1648), Aleyn 26]; and yet, in consideration of the risks to which common carriers are exposed such prevention is in their case an implied exception" (*Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, at p. 121: *Willes*, J., delivering the judgment of the Court (*Erle*, C.J., *Pollock*, C.B., *Martin*, B., *Willes* and *Keating*, JJ., and *Pigott*, B.)).

7. "Undoubtedly, the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise" (*Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, at p. 390: *Montague Smith*, J., delivering the judgment of the Exchequer Chamber (*Kelly*, C.B., *Byles*, *Keating*, and *M. Smith*, JJ., *Channell* and *Bramwell*, BB.)).

8. "The rule imposing this extended liability on common carriers

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party may rescind the contract. The same result is reached by regarding the shipowner's or master's duty as bailee of the goods. The law gives to him the power of transhipping. If he will not save the cargo when that is the only way of doing so, he ought not to allow it to perish by depriving the cargo owner of the chance of transhipping" (*Owen* v. *Outerbridge*, 26 S. C. R. 272).

was originally established, as Lord *Mansfield* states, in *Forward* v. *Pittard* (1785), 1 T. R. 27 at p. 33, on the ground of public policy: 'to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies or by such an act as could not happen by the intervention of man.' And Lord *Holt* explains it, in the celebrated judgment in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, at p. 918 as existing in the case of one that exercises a public employment: 'And this is the case of the [common carrier] common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged 26 [*qu.* 24 & 25] Car. 2, in the case of *Mors* v. *Slue* (1673), 1 Vent. 190, 238. And this is a politic establishment contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing' It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability" (*Liver Alkali Co.* v. *Johnson* (1874), L. R. 9 Ex. 338, at p. 340: *Blackburn*, J.). The last sentence is cited by Lord *Russell*, C.J., in *Hill* v. *Scott* (see *ante*, pp. 349, 350).

9. "I take it the law is very clear to this extent that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions) he may be said to be an insurer" (*Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256, at p. 260: *Blackburn*, J.).

10. "If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible" (*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 750: Lord *Cairns*, L.C.).

See also *post*, Section XVI.—(k) As to the "act of God" and "Queen's enemies."

Inherent Vice.

1. "A carrier is not responsible for damage arising from any inherent defect in an article delivered to him to be carried" (*Hudson* v. *Baxendale* (1857), 2 H. & N. 575, at p. 583: *Watson*, B.).

2. "There is no doubt in this case that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice,' that is to say, from fright, or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable. Since this was written, the case of *Blower* v. *Great Western Rail. Co.* (May 28th, 1872), L. R. 7 C. P. 655 has been decided in the Common Pleas to this effect (see next case). . . . The evidence of the plaintiff [that the horse was quiet and used to travelling] makes it *improbable* it was the 'proper vice' of the horse; the evidence of the defendants [that there was nothing to excite the horse to do what he did to his own damage, no cause of mischief except his own inherent disposition] makes it impossible it was otherwise" (*Kendall* v. *London and South Western Rail. Co.* (June 10th, 1872), L. R. 7 Ex. 373, at pp. 377, 378: *Bramwell*, B.).

3. "The reason [why a common carrier is liable for a loss though happening without any negligence at all on his part, unless in the case of the act of God or the Queen's enemies] is so well known and so well explained by Lord *Wensleydale* in *Wyld* v. *Pickford* (1841), 8 M. & W. 443, that it is unnecessary to add anything, or to heap up authorities on the subject. A common carrier is liable as an ordinary bailee for negligence; and he is liable for a loss occasioned by negligence, even though the act of God or of the Queen's enemies conduce to the loss. But he is further liable as an insurer for losses which occur through no negligence on his own part. It is only necessary, therefore to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. This is well explained in Smith's Mercantile Law, 8th ed. 354 where it is said: 'The underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms [*Rohl* v. *Parr* (1796), 1 Esp. 445], or rats [*Hunter* v. *Potts* (1815), 4 Camp. 203] or the self-ignition of damaged hemp [*Boyd* v. *Dubois* (1811), 3 Camp.

133].' So, in *Brass* v. *Maitland* (1856), 6 E. & B. 470, goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character, and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the Court of Queen's Bench that an action lay against the shippers. That case was followed by *Hutchinson* v. *Guion* (1858), 5 C. B. (N.S.) 149 and *Hearne* v. *Garton* (1859), 2 E. & E. 66, and the same law was laid down in *Alston* v. *Herring* (1856), 11 Ex. 822 with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments § 492A, where the authorities are all collected : 'Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies ; yet it is to be understood in all cases that the rule does not cover any losses not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. (14) Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper ; for, the carrier's implied obligations do not extend to such cases' " (*Blower* v. *Great Western Rail. Co.* (May 28th, 1872), L. R. 7 C. P. 655, at pp. 663, 664 : *Willes*, J.).

4. " If the jury had found that the injury was caused solely by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence on the part of the defendant's servants, I am of opinion that a plea that the injury to the mare was caused by the vice of the mare herself would have been proved.

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(14) In order to bring the loss of the goods within the exception "the act of God," there must be two things : first, an act which occurred without the intervention of man, and, second, a result such as could not by the exercise of reasonable care, skill, and ability have been avoided by the parties charged with the loss (*per Rose*, J., judgment affirmed, 17 App. R. 480 : *Andersen* v. *Canadian Pacific Rail. Co.*, 17 O. R. 747).

The case of *Kendall* v. *London and South Western Rail. Co.* (1872), L. R. 7 Ex. 373 and *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655 are direct authorities to this effect" (*Nugent* v. *Smith* (1876), 1 C. P. D. 423, at p. 439: *Mellish*, L.J.).

5. The plaintiffs delivered to the defendants in London eighteen bales of rags to be conveyed to Wrotham Station, at which place it was admitted that they would in the ordinary course of business arrive within twenty-four hours. By mistake they were sent to another station. The rags having been packed in a damp state, heated and rotted.

"The true measure of damages in a case of this kind is that which may fairly be said to have been in the contemplation of the parties at the time as the natural consequence of a breach of contract on the part of the defendants. The goods in question were not delivered or tendered to the consignees until fourteen days after the time at which they ought to have been delivered. What were the natural or necessary damages resulting from that delay? If the rags had been dry when delivered to the company, the damage would have been nil. The rags however were then damp, and hence their destruction. But the company did not know they were damp. It was the duty of the plaintiffs to inform the company at the time, if special care were required in dealing with the rags. The point was not raised in *Hooper* v. *London and North Western Rail. Co.* (1881), 50 L. J. Q. B. 103" (*Baldwin* v. *London, Chatham and Dover Rail. Co.* (1882), 9 Q. B. D. 582, at p. 584: *Mathew*, J.). (15)

See also *post*, Section X.—Dangerous Goods.

6. "It is clear law that a common carrier by land is, in the absence of exemption by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies and 'inherent vice' alone excepted; and he is therefore, in the absence

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(15) The plaintiffs had undertaken to carry a cargo of stone in their schooner from Cleveland to Prescott, and had got as far as Kingston, when she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to Prescott. In an action brought by the plaintiffs for injury,—*Held*, that they could not recover as damages any part of the freight, for they might adopt the defendants' act and recover the whole from the consignees (*Stevenson et al* v. *Calvin*, 25 U. C. Q. B. 102).

In an action against a common carrier for the loss of goods, a jury is not justified in giving a verdict of greater damages that the value of goods actually proved to have been contained in the case, and the maxim, *Omnia præsumuntur contra spoliatorem* will not apply unless it is shewn that the goods were in the defendants' possession, and that they had an opportunity, but omitted to shew the value (*Smith* v. *Lunt*, N. B. R.; 2 Pug. 64).

of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants. A dictum apparently to the contrary effect, attributed to *Willes*, J., in *Metcalfe* v. *London and Brighton Rail. Co.* (1858), 4 C. B. (N.S.) 307 at pp. 309, 310, was afterwards disclaimed by him in a note to *Coggs* v. *Bernard* (1704), 1 Sm. L. C. 9th ed. p. 246" (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at p. 380: *Wright*, J., reading the judgment of the Court (*Lawrance* and *Wright*, JJ.).

Carrier's Duty.

A carrier and his servants must take all the care that is necessary for the preservation of the property committed to his or their charge, *i.e.*, reasonable care, skill, and expedition independently of his responsibility as an insurer.

"Something much short of that sort of conduct [gross negligence] will be sufficient to make a carrier responsible. He and his servants must take all the care that is necessary for the preservation of the property committed to his charge. They must take the same care of it that a prudent man would take of his own property" (*Batson* v. *Donovan* (1820), 4 Barn. & Ald. 21, at p. 30: *Best*, J.). (16)

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(16) The defendants, the Hudson's Bay Co., who were common carriers, undertook the carriage of plaintiff's goods from Victoria to Yale, the danger of fire and navigation excepted. The carriage for part of the distance was by means of the Pioneer line, and on this latter line the plaintiff's goods were destroyed by fire due to the negligent stowage of hay on the Pioneer steamer on which the plaintiff's goods were being carried:—*Held*, that the bad stowage was due to negligence, to which the loss of plaintiff's goods by fire was fairly attributable, and that the defendants were liable to the plaintiff, being responsible for negligence of the Pioneer line, who were their agents. *Per Begbie*, C.J.: Ordinary care does not mean the care (or recklessness) usually exhibited, but the care (*i.e.*, the precaution) which would be exhibited by a man of ordinary prudence and experience; and a reckless carrier cannot be excused by showing that he has for years been always reckless" (*Hamilton* v. *Hudson's Bay Co. et al*, 1 S. C. B. C. R., 176).

In putting a large cask of brandy on board a vessel from a wharf, a carrier used can hooks. In lowering the cask from the wharf one of the chains (by which the hooks held the cask) broke, and the cask fell into the hold and was destroyed:—*Held*, that it was negligence to use can hooks instead of slings to lower the cask" (*Street* v. *Morrison*, N. B. Reps., Stephen's Digest, 1880, 283). A common carrier is liable for the negligence of his servants in taking goods on board his vessel in his absence, though he may have directed them not to receive goods, the plaintiff having no notice of such instructions (*Street* v. *Morrison*, 5 All. 296).

The captain of a vessel told plaintiff to send her goods to a certain wharf, and she sent them there:—*Held*, that there was evidence of a constructive delivery to the defendant which imposed on him the duty of looking after plaintiff's goods and taking them on board (*Morrison* v. *Thompson*, 2 Russell & Chesney, 411).

"This action is on the case against a common carrier [coach proprietor] upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it" (*Bretherton* v. *Wood* (1821), 3 B. & B. 54, at p. 62 : *Dallas*, C.J.).

Gross Negligence includes the Want of Reasonable Care, Skill and Expedition.

"In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill and expedition which may properly be expected from persons so holding themselves out and their servants" (*Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337 at p. 341 : *Crompton*, J., delivering the judgment of the Exchequer Chamber (*Cockburn*, C.J., *Wightman*, *Crompton*, *Willes*, *Byles* and *Keating*, JJ.)).

Previous Order to Carrier to Deal with Goods in a Particular Manner.

"Where an order is given, previously to the delivery of goods to a bailee, *carrier*, or other person, to deal with them, when delivered in a particular manner, to which he assents ; and afterwards the goods are accordingly delivered to him ; a duty arises on his part, upon the receipt of the goods, to deal with them according to the order previously given and assented to ; and the law infers an implied promise by him to perform such duty" (*Streeter* v. *Horlock* (1822), 7 Moore, 283, at p. 287: *Park*, J.). (17)

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(17) The plaintiff delivered from time to time a quantity of apples to defendants at their warehouse, for the purpose of shipment by their railway. A sufficient quantity having been delivered to fill a car, the plaintiff applied for, and was promised one at a named date. The defendants failed to furnish the car at the date specified, and a fire occurring, the apples were destroyed. The trial judge entered judgment for plaintiff, the question being, Were the defendants carriers or warehousemen ? On appeal the court were divided.

When delivery be made at the warehouse or other place of business of the carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may necessarily occur in awaiting the departure of the trains, he becomes, the moment the delivery is made, a carrier as to the goods, and his responsibility as such at once attaches (*Milloy* v. *Grand Trunk Rail. Co.*, 23 O. R. 454).

Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a

Informing Carrier as to Quality and Value of Goods.

A carrier is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them and he is informed of their quality and value.

A carrier is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are.

If a carrier does not ask for this information, or if when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be.

A carrier may limit his responsibility as an insurer by notice; but a notice will not protect him against the consequences of a loss by gross negligence.

The following extract is an excellent summary of the duty and liability of a carrier, in which the above rules will be found to be stated.

"In a state of society such as that we live in,—in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world,—so much property must be entrusted to carriers, that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and, therefore, cannot determine what precautions are proper for his security.

"Fearful of laying down any rule which might be injurious either to the public or to those most useful servants of the public, common carriers, we thought it right to avail ourselves of the leisure afforded us by the long vacation, to consider of the cases of *Riley* v. *Horne* (1828), 5 Bing. 217, and *Macklin* v. *Waterhouse* (1828), 5 Bing. 212. When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.

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dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company, including anticipated profits (*Kennedy* v. *American Express Co.*, 22 O. A. R. 278).

"To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.

"From his liability as an insurer, the carrier is only to be relieved of two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not,—namely, the act of God and the King's enemies.

"As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptation to dishonesty. He *must* take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him.

"By means of negociable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole,) always have the amount of what they are to answer for specified in the policy of insurance.

"If the extent of risk is ascertained in cases in which persons are not obliged to insure, and if they do insure may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in sessions, if they think proper to settle the rates of carriage, will allow under the statute of William and Mary [(1692), 3 W. & M. c. 12, s. 24, Rep. 30 & 31 Vict. c. 59], and where no such rates are made, what a jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel in which the value of the parcel should he specified, as well as the price to be paid for the carriage. But it would add very little to the

labour of the book-keeper if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance.

"The giving of such memorandums would entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such memoranda might bring the parties within the reach of the stamp laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual for their security, and have driven them to the expedient of giving notices that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value.

"In *Batson* v. *Donovan* (1820), 4 B. & Ald. 21, the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value, and that it made it the duty of the owner of the goods to apprize the carrier that the parcel was of value.

"The legislature would probably think, if its attention were called to the subject, that a stamp-duty on contracts relative to inland carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts. A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of the goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier.

"It was decided in *Gibbon* v. *Paynton* (1769), 4 Burr. 2298, that any artifice made use of to induce a carrier to think that a parcel of jewellery contained only things of small value, would prevent the owner from recovering for the loss of his parcel.

"In *Kenrig* v. *Eggleston* (1684), Al. 93, it was held that the owner was not required to state all the contents of the parcel, but it was for the carriers to make a special acceptance. In *Tyly and Others* v. *Morrice* (1700), Carth. 485, in which the preceding case is recognized and confirmed, it is said that the true principle is, that the carrier is only liable for what he is fairly told of. In *Titchburne* v. *White* (1618), Str. 145, it was determined that

a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did *not* contain money, or he accepted it *on the condition* that it did not contain money.

"It may be collected from these authorities that it is the duty of the carrier to enquire of the owner as to the value of his goods, and if he neglects to make such enquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is responsible for the full value of the goods, however great it may be. This is a convenient rule; it imposes no difficulty on the carrier. He knows his own business, and the laws relative to it. Many persons who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carriers should be obliged to tell them what they should do.

"Although a carrier may prove that the owner of goods knew that the carrier had limited his responsibility by a sufficient notice, yet, if a loss be occasioned by gross negligence, the notice will not protect him. Every man that undertakes for a reward to do any service, obliges himself to use due diligence in the performance of that service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat* v. *Fagg* (1822), 5 B. & Ald. 342; *Wright* v. *Snell* (1822), 5 B. & Ald. 350; *Birkett* v. *Willan* (1819), 2 B. & Ald. 356; *Beck* v. *Evans* (1812), 16 East, 244, and *Bodenham* v. *Bennett* (1817), 4 Price, 31.

"The jury are to decide what is gross negligence. (18) We may, however, observe, that the most anxiously-attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of.

"If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance, unless paid a premium proportioned to their value.

Canadian Cases.

(18) In cases of negligence, it is not essential, as in insurance cases, that the proximate cause should alone be regarded. It is sufficient if an efficient cause of the thing complained of is found in some tortious act of the defendant. The plaintiff is not bound to prove negligence beyond reasonable doubt: *per King*, J. (*Rainnie* v. *St. John City Rail. Co.*, 31 N. B. R. 582; *Watson* v *Northern Rail. Co.*, 24 U. C. Q. B. 98).

"We have established these points,—that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by gross negligence" (*Riley* v. *Horne* (1828), 5 Bing. 217, at pp. 219, 220, 221, 222, 223, 224: *Best*, C.J., delivering the judgment of the court). (19)

It is the duty of the carrier receiving the goods to ask such questions about them as may be necessary; if he asks no questions, and there is no fraud to give the case a false complexion on the delivery of the goods, he is bound to carry them.

"I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether" (*Walker* v. *Jackson* (1842), 10 M. & W. 161, at pp. 168, 169: *Parke*, B.).

Canadian Cases.

(19) The statute 42 Vict. c. 9, s. 29 (4), precludes a carrier from setting up an indorsed condition, when the loss charged happened through the carrier's negligence (*Henry* v. *Canadian Pacific Rail. Co.*, 1 Man. L. R. 210).

In this action, brought for the non-delivery of sawn lumber delivered to defendants at P., to be carried by them to B., defendants pleaded a condition indorsed on the shipping bill, as follows: "That the company will not be responsible for any deficiency in weight or measure of gain, in bags or in bulk, nor for loss or deficiency in the weight, number, or measure of lumber, coal, or iron of any kind carried by the car-load." The evidence showed that the lumber was loaded at P., and that a portion of it was not delivered at B. There was no evidence as to how the loss occurred:—*Held*, that by the statute 42 Vict. c. 9, s. 25 (4), the defendants were precluded from setting up the indorsed conditions when a loss is charged as happening through their own negligence. That in the absence of evidence, the non-delivery might be assumed to have arisen from mis-delivery to some other person, or from the actual use of the property by the defendants for their own purposes, in which cases the conditions would be no protection (*Greene* v. *St. John*, 22 N. B. R. 252).

"It was laid down in the case of *Walker* v. *Jackson* (1842), 10 M. & W. 161, at p. 169 by Lord *Wensleydale*, who was certainly a master in the art of laying down general propositions of mercantile law, that as a general rule 'if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he asks no questions, and there is no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry it as it is,' *i.e.*, to carry it as a carrier" (*Lebeau* v. *General Steam Navigation Co.* (1872), L. R. 8 C. P. 88, at p. 97: *Brett*, J.).

Notice that Carrier will not Receive Goods unless Declared and Insured, Immaterial in the Absence of Positive Fraud.

"A third point was raised, that the plaintiff is precluded from succeeding because she delivered valuables without declaring them, having notice that the company would not receive them unless declared and insured, and it was argued that this was a fraud, or that in some way the plaintiff was estopped. In the early part of the century this point was raised in many cases, and the decisions were conflicting; but since the case of *Walker* v. *Jackson* (1842), 10 M. & W. 161 it seems to have been regarded as settled law that a carrier cannot succeed on this ground in the absence of positive misrepresentation or other actual fraud, and the older decisions have dropped out of the books" (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at p. 380: *Wright*, J., reading the judgment of the court (*Lawrance* and *Wright*, JJ.).

Action of Tort or Contract against a Carrier as such.

"Ever since *Pozzi* v. *Shipton* (1838), 8 A. & E. 963 it has been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common law duty to carry safely, independently of the particular contract which he makes. *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655 is a recent decision to that effect" (*Tattan* v. *Great Western Rail. Co.* (1860), 2 El. & El. 844, at pp. 853, 854: *Crompton*, J.).

See *Baylis* v. *Lintott* (1873), L. R. 8 C. P. 345.

"It is unnecessary for us to determine whether *Tattan* v. *Great Western Rail. Co.* (1860), 2 El. & El. 844 was rightly decided; for it came before the Court of Queen's Bench before the passing of the County Courts Act (30 & 31 Vict. c. 142) s. 5; but we may

say that we are not satisfied with the decision in that case" (*Fleming* v. *Manchester and Sheffield Rail. Co.* (1878), 4 Q. B. D. 81, at pp. 83, 84: *Bramwell*, L.J., delivering the judgment of the court (*Bramwell*, *Baggallay*, and *Thesiger*, L.JJ.)).

Carrier's Liability to Consignor or Consignee.

"This is an action by the consignee against a carrier to recover the value of goods lost in the course of conveyance. The question is whether the property passed to the vendee. If it passed, the plaintiff, the vendee, is the proper person to sue; if not, the vendor should have sued. It would be very inconvenient to treat the liability of a carrier as ambulatory,—to hold that he is not liable to the consignee unless the latter does some act showing an intention to treat the contract as valid, but that he may be made liable by the act of the consignee in bringing an action. The argument of the plaintiff's counsel would go to this extent: that the consignee, in a case where the contract is incomplete, may elect to treat it as valid, and by such adoption entitle himself to say, as against the carrier, that he is the proper person to sue. But the liability of the carrier cannot be altered by anything which takes place after the loss: it must be certain at the moment of the loss" (*Coombs* v. *Bristol and Exeter Rail. Co.* (1858), 3 H. & N. 510, at p. 515: *Pollock*, C.B.). (20)

Canadian Cases.

(20) *Busby* v. *Winchester*, 27 N. B. R. 231; *Forbes* v. *Holtz*, 4 All. (N. B. R.) 611.

SECTION VI.

RESTRICTION OF CARRIER'S OBLIGATIONS AND LIABILITY BY PUBLIC NOTICE OR SPECIAL CONTRACT.

(a) *Limitation of Obligations*, p. 389.
(b) *Limitation of Common Law Liability*, p. 390.
(1) *Public Notice or Declaration*, p. 390.
(2) *Ticket or other Document in Common Form*, p. 400.

(a) Limitation of Obligations.

At common law a carrier may publicly limit his obligation to carrying particular goods only, to carrying to and from particular places only, to carrying in particular kinds of conveyances, to carrying for particular prices and methods of payment, to carrying at particular times, and to delivering in a particular manner.

A Carrier may Profess to Carry Particular Goods only, or to and from certain Places only.

1. "A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual (provided he tenders the money at the time, and there is room in the conveyance), has a right to call upon him to receive and carry goods according to his public profession" *Johnson* v. *Midland Rail. Co.* (1849), 4 Ex. 367, at p. 373: *Parke*, B.). (21)

Carrier's Right to Choose Kind of Conveyance, Times for Transit, Mode of Delivery, Articles, Price, Time of Payment, to qualify his Liability as Insurer.

2. "If a person chooses to profess to be a common carrier, the law creates a duty to receive things brought for carriage, and he

Canadian Cases.

(21) In an action against defendants as common carriers, the plaintiff proved a receipt signed by them contracting to carry on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in Goderich had arrangements with defendants for the carriage of fish:—*Held*, that this was some evidence that defendants were common carriers, and that if so they were liable to an action at common law for refusing to carry except upon conditions limiting their common law liability (*Leonard* v. *American Express Co.*, 26 U. C. Q. B. 533).

may be liable *ex delicto* for a refusal to receive (*Pickford* v. *Grand Junction Rail. Co.* (1841), 8 M. & W. 372): But this duty is regulated according to his will in many respects. He may choose the kind of conveyance, the times for transit, the mode of delivery, the articles that he will profess to carry, what price he will have, when he shall be paid; and the duty to receive is always limited by his convenience to carry: see *Jackson* v. *Rogers* (1695), 2 Show. Cases 330 p. 554; *Johnson* v. *North* [*sic*] *Midland Rail. Co.* (1849), 4 Ex. 367. This right to qualify the duty of receiving, according to terms and conditions fixed by the carrier alone, comprises the right to qualify the common law duty of insuring safety" (*M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327, at p. 336: *Erle*, J.).

Carrier Carrying Particular Articles from Particular Places only.

3. "It is the duty of a common carrier to carry in accordance with the conditions he holds out to the public, but where such conditions do not restrict him, he has an option as to the method in which he is to conduct his business. He may carry coals from particular stations only, and other articles from other stations only, as it may suit his convenience" (*Oxlade* v. *North Eastern Rail. Co.* (1861), 9 W. R. 272, at p. 273: *Erle*, C.J.). (22)

Carrier Carrying Certain Things on Certain Terms.

4. "At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at p. 183: *Lindley*, L.J.).

(b) Limitation of Common Law Liability.

(1) *Public Notice or Declaration.*

No *public* notice or declaration is (since September 1st, 1830) to be deemed or construed to limit, or in anywise affect the *liability* at common law of any public common carrier. This rule, however, does not extend to, and is not to be construed so as to annul, or in anywise affect any *special contract* between common carriers and their customers. See *post*, at pp. 430—432, Section VII.—The Carriers Act, 1830, ss. 4, 6.

At common law, a carrier's public notice or declaration limiting

Canadian Cases.

(22) *Fowler* v. *Hooker*, 4 U. C. Q. B. 18; *Holman* v. *Weller*, 8 U. C. Q. B. 202.

his common law liability *if brought home* to his customer, amounts to a *special contract*. (23)

Carrier's Printed Hand-bills in Circulation prevail over any Notice in his Office.

1. "The printed papers in circulation dispensed with any necessity to attend to the notice in the office. Why should a

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Canadian Cases.

(23) The plaintiff delivered to the defendants for carriage a quantity of oil which the defendants accepted under certain conditions indorsed on a receipt given to the plaintiff, providing that they would not be responsible for leakage, delay, or loss of market, etc. :—*Held*, following *Hamilton* v. *Grand Trunk Rail Co.*, 23 U. C. Q. B. 600, that such delivery and acceptance constituted a special contract which exempted the defendants from all liability for loss sustained in consequence of the accidents provided against, though such accidents had been caused by the defendants' negligence (*Spettigue* v. *Great Western Rail. Co.*, 15 U. C. C. P. 315).

In the absence of legislative enactments of a restraining character, a railway or steamboat company may impose such terms upon the public as to exempt the company from responsibility for injury, however caused, including, therefore, gross negligence, and even fraud or dishonesty on the part of their servants (*Dodson* v. *Grand Trunk Rail. Co.*, 2 Geldert and Oxley (N.S.) 405).

When the defendant undertook to carry for hire certain goods of plaintiff's, at plaintiff's risk :—*Held*, that this qualification went to the foundation of the agreement and the liability consequent thereupon, and exempted defendant from any liability in respect of the contract (*Stevenson* v. *Gildersleeve*, 2 U. C. C. P. 495).

The plaintiffs sued the defendants for breach of a contract to carry a quantity of petroleum in covered cars from L. to H., alleging that they so negligently carried the same that it was exposed to the weather and destroyed. One of the conditions under which the oil was carried was that "oil under no circumstances be carried save at the risk of the owners" :—*Held*, that the defendants were guilty of negligence, liability for which the condition did not exempt them (*Fitzgerald* v. *Grand Trunk Rail. Co.*, 4 O. A. R. 601, and 5 S. C. R. 204).

Per Moss, C.J.A. : "The law applicable to this case is the same as governed the English courts before the passing of the Railway and Canal Traffic Act, 1854, and the carrier could by conditions aptly framed protect himself against the consequences of negligence.

"My examination of the modern cases has led me to the conclusion that in none of them has it been decided as a pure question of construction that the use of the words 'at owner's risk' free the carriers from all liability for negligence."

Notwithstanding a stipulation "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk," it was held when oil was carried in open cars and delayed in different places, that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract, and in contravention as well of the undertaking as of their duty as carriers (*Fitzgerald* v. *Grand Trunk Rail. Co.*, 5 S. C. R. 204. Judgment of Appeal Court, Ontario, affirmed).

Per Sir *William Ritchie* : "The case is not one of mere negligence, but of wilful negligence amounting to direct misfeasance."

person read the board [in the office] when previously informed by the hand-bill of the terms on which the defendant carried on his business? I have a right to presume, that what is circulated by his authority contains the whole of the limitations he intends to put on his common law responsibility as a carrier, and gives a full statement of the special contract into which he enters with his customers" (*Cobden* v. *Bolton* (1809), 2 Camp. 108, at p. 109: Lord *Ellenborough*).

Carriers should take care that Customers are fully informed of the Limitation—Large and Small Print. (24)

2. At the defendant's waggon offices in London and Gloucester, there was a board with large letters painted upon it, giving the usual notice. But at Cheltenham the only mode taken to publish this notice was by nailing upon the office door a hand-bill, stating in *large print* the many advantages belonging to the waggon, and in a *very small character* at the bottom, that the owner would not be answerable for goods above the value of 5*l.* unless entered as such, and paid for accordingly.

Lord *Ellenborough* said: "This is not enough to limit the defendant's common law liability. We have not sufficient evidence of any special contract. The jury ought to believe that at the time when the trunk was delivered at the waggon office at Cheltenham, the plaintiff or his agent there saw, or had ample means of seeing, the terms on which the defendant carries on his business. How can this be inferred from the hand-bill nailed on the door, which called attention to everything that was attractive, and concealed what was calculated to repel customers? If a common carrier is to be allowed to limit his responsibility, he must take care that everyone who deals with him is fully informed of the limits to which he confines it" (*Butler* v. *Heane* (1810), 2 Camp. 415, at pp. 415, 416.

3. Lord *Ellenborough*, in *Clayton* v. *Hunt* (1811), 3 Camp. 27, at p. 28, said that the notice in the office [that the defendant would not be liable for any package above the value of 5*l.* unless an insurance were paid upon it] ought to be in such *large*

Canadian Cases.

(24) Where an exception against loss by dangers of navigation is contained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence or improper conduct must be very clear in order to make the ship owner liable, and although it lies upon the defendant in the first place to bring himself within the exception, yet this is sufficiently done by showing a shipwreck from stress of weather, and the plaintiff is then called upon to establish that the loss would not have happened, but from negligence or want of skill (*Harnden* v. *Proctor*, 9 U. C. Q. B. 592).

characters that no person delivering goods there could fail to read it without gross negligence ; and that, if a carrier's servant receives goods at a distance from the office, the special terms on which he deals ought to be communicated through some other medium.

Notices at Termini, and not at Intermediate Receiving Places, limiting General Responsibility.

4. "The carrier is responsible, unless xpress notice be brought home to the plaintiff. But a notice of certain limitation upon his general responsibility, suspended at his offices in London and Worcester, will not attach upon the delivery of goods at an intermediate place, where no notice is stuck up. Goods delivered at such places come under his general responsibility ; and he is answerable for their loss. It has been holden by Lord *Kenyon*, that notices at the *termini* of a journey were not sufficient to protect carriers with respect to goods taken in at intermediate receiving houses. [His Lordship added, that carriers should be cautious that their notices corresponded in all places where they were affixed, or their liability would be affected by a variance]" (*Gouger* v. *Jolly* (1816), Holt, 317, at p. 318 : *Gibbs*, C.J.).

Notice of Terms by Advertisement—Necessity of a Special Contract.

5. "If the carriers notified their terms to the person bringing the goods by an advertisement, which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms ; but the question in these cases always is, whether the delivery was upon a special contract" (*Leeson* v. *Holt* (1816), 1 Stark. 186, at p. 188 : Lord *Ellenborough*).

The Limitation of Responsibility should be Brought Home. Notice to Customer unable to Read.

6. "*Abbott*, J., after having explained to the jury the necessity of a special contract to be proved on the part of the defendants [carriers], in order to relieve themselves from their responsibility at common law, observed, in order to avail themselves of such a limitation, it is essential that they should bring the knowledge of it plainly and clearly to the mind of the party who deals with them, that they intend so to limit their liability. In order to do this, it has been the most usual course to put up a notice in the office ; but it may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does

not communicate his intention by some other means; the book-keeper may inform him. In this case, notice was stuck up in the office, but it seems that it gave no information to the party, since he was not able to read; and I think that notice has not been sufficiently brought home to the knowledge of the party" (*Davis* v. *Willan* (1817), 2 Stark. 279, at p. 280). (25)

Notice in Newspaper taken in by Customers.

7. Action against a carrier for losing a parcel of bank notes which the plaintiff had forwarded by his coach. To bring the knowledge of a general notice (that the carrier would not be responsible for parcels of any value unless certified at the time of booking) home to the plaintiff, it was proved on the part of the defendant, that the plaintiff had taken in for three years a weekly newspaper in which the defendant's notice had always been advertised. The jury, however, found a verdict for the plaintiff to the amount of the loss he had sustained.

The court—on a new trial being moved for—thought the verdict perfectly right, and that it could not be intended a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished by means of a notice to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person who brought a parcel for conveyance, a printed paper containing the notice (*Rowley* v. *Horne* (1825), 3 Bing. 2).

Canadian Cases.

(25) The plaintiff purchased from an agent of the defendant company at Ottawa, what was called a land-seeker's ticket, the only kind of return ticket issued on the route, for a passage to W. and return, paying some thirty dollars less than the single fare each way. The ticket was not transferable, and had printed on it a number of conditions, one of which limited the liability of the company for baggage and wearing apparel not exceeding a hundred dollars in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and having sore eyes at the time, she was unable to read them herself. On the trip to W. an accident happened to the train, and plaintiff's baggage, valued at over a thousand dollars, was destroyed. In an action for damages the jury found for the plaintiff for the amount of the alleged value, and it was held by the Supreme Court that there was sufficient evidence that the loss was caused by defendants' negligence, and the special conditions printed upon the ticket not having been brought to the notice of the plaintiff, she was not bound by them, and could recover her loss from the company (*Bate* v. *Canadian Pacific Rail. Co.*, 15 O. A. R. 338; 18 S. C. R. 697).

Knowledge of Principal is the Knowledge of his Agent.

8. "At common law, carriers are responsible for the value of the goods they undertake to carry, but they may limit their responsibility by making a special contract, and that is usually done by giving public notice that they will not be accountable for parcels of a given description. In order, however, to show in any particular case that they are not subject to the common law responsibility, they must prove that the party sending the goods had knowledge of the notice. But the knowledge of the principal is the knowledge of the agent" (*Mayhew* v. *Eames* (1825), 3 B. & C. 601, at p. 603. *Per curiam*).

Effect of Carrier's Limitation of Common Law Liability by Contract.

"We agree that if the notice [that the defendants would not be responsible for the loss of or damage done to the goods] furnishes a defence, it must be either on the ground of fraud or of a limitation of liability by contract; which limitation it is competent for a carrier to make, because being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own; and if the proprietor of the goods still chooses that they should be carried, it must be on those terms: and probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable *as upon the custom of England* for the remainder" (*Wyld* v. *Pickford* (1841), 8 M. & W. 443, at p. 458: *Parke*, B.). (26)

If there are two Notices, the Carrier is bound by that which is less Favourable to himself, and more Favourable to the Customer.

"We are of opinion that the contract was upon the terms mentioned in the hand-bill [that the defendants were not to be responsible for any loss or damage arising from any cause whatever during the transit], which was every month circulated amongst

Canadian Cases.

(26) When an express company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of package unless within sixty days of loss or damage, a claim should be made by written statement, with a copy of the contract annexed:—*Held*, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the Express Company for failure to deliver the parcel to the consignee (*Northern Pacific Express Co.* v. *Martin*, 10 Man. Reps. 595; 26 S. C. R. 135; *Richardson* v. *The Canada West Farmers' Insurance Co.*, 16 U. C. C. P. 430, distinguished).

the public, and which was proved, and indeed admitted by Mr. Collier on the argument, to have been received by the plaintiffs. The only difficulty has arisen from there being a freight note, the terms of which do not correspond with the terms of the handbill. Mr. Collier contended, on the authority of the case he cited [*Munn* v. *Baker* (1817), 2 Stark. N. P. 255], that where there are two sets of terms, the carrier is bound to consider that one as binding which is least favourable to himself and most favourable to those he deals with—a rule of law perfectly clear" (*Phillips* v. *Edwards* (1858), 3 H. & N. 813, at p. 820: *Pollock*, C.B.).

There may be a Special Contract notwithstanding it conflicts with a general Notice.

Notice to one Partner is Notice to all Partners.

A box containing watch-cases worth 185*l.* was sent by the plaintiffs from Liverpool to one Walker, the assay master at Chester, to be assayed. The box was sent by Walker to the mail-coach office at Chester, which was kept by Mrs. Tomlinson, directed to the plaintiffs at Liverpool. The box was lost, and there was reason to suspect that it was stolen out of the coach-office at Chester. The defendants had put up a notice in the office that they would not be accountable for any parcel or package whatever above the value of five pounds unless the same were entered and paid for accordingly.

"There is no doubt that common carriers may limit their responsibility by a notice, that they will not be answerable for goods of more than a certain value; but they may, notwithstanding a general notice of that description, be bound by a special contract made with any individual. Now it seems to me, that from the conversation between Mrs. Tomlinson and Walker, if that were believed, the jury might very well infer that she undertook to carry all parcels sent by Walker, as assay master, by any coaches of which she was a proprietor, at the ordinary rate of carriage. If it proved a contract, I have no difficulty in saying it would bind all the partners at that time, and all who might afterwards become so, until some notice of an intention to rescind the contract was given to Walker. It does not distinctly appear when the notice was put up; if it was put up before this conversation with Mrs. Tomlinson, that would take it out of the notice; if it was introduced at a subsequent period, it was the duty of Mrs. Tomlinson, if she meant to vary the course of dealing with Walker, to give him special notice of such intention" (*Harris* v. *Mears* (1[illegible] 5 B. & C. 504, at pp. 507, 508: *Bayley*, J.).

Carrier's Knowledge of the Value of Contents no Waiver of Notice.

In *Alfred* v. *Horne* (1822), 3 Stark, 136, *Abbott*, C.J., was of opinion that the taking of a parcel by the defendant's agent, after notice of the value of the contents, did not amount to a waiver of the notice ; and said that there was no case in which it had been decided, that the effect of a notice had been done away with by the mere circumstance that the carrier knew the value of the contents of the parcel.

Notice by Advertisement; Knowledge of the Value does not take the Case out of the General Rule.

"There are two decisions in conformity with our present opinion. The first is *Harris* v. *Packwood and Another* (1810), 3 Taunt. 264. In that case the goods were silk: the carrier had circulated an advertisement, declaring his charge for the carrying of silk goods to be at the rate of 9*s*. 4*d*. per cwt., while for ordinary bulky articles he charged only 6*s*. But he was held to be protected by an advertisement like that which has been published by the present defendant. It is not, indeed, distinctly stated that the carrier at the time he received the parcel knew that it contained silk, but that fact can hardly be doubted, because the parcel was to be conveyed to Coventry, where the plaintiff lived ; and the defendant had sent a copy of his notice to him there. In this case it was also held that it was not incumbent on the defendant to prove affirmatively that he had used reasonable care, but that the proof of negligence lay on the plaintiff. In the case of *Levi* v. *Waterhouse* (1815), 1 Price, 280, it was proved that the carrier's servant, who received the parcel, knew the value of its contents, but *Gibbs*, C.J., before whom the cause was tried, held that the mere knowledge of the value did not take the case out of the general rule : and his opinion was confirmed by the Court of Exchequer after argument and consideration, and a rule which had been obtained for setting aside the verdict was discharged" (*Marsh* v. *Horne* (1826), 5 B. & C. 322, at pp. 327, 328 : *Abbott*, C.J., delivering the judgment of the court).

Limitation of Carriers' Common Law Liability in Cases of Negligence, Misconduct, or Fraud. (27)

1. "According to the old cases, the construction of carriers' notices had this limitation put upon them, that according to the ordinary terms of the notice, he would be responsible for gross

Canadian Cases.

(27) *Leonard* v. *American Express Co.*, 26 U. C. Q. B. 533.

Act" negligence, unless he excluded his liability in express terms" (*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, at p. 711: *Parke*, B.).

A Carrier may at Common Law by Special Contract limit his Responsibility even in the case of Gross Negligence, Misconduct, or Fraud. (28)

2. "The cases decided in our courts between 1832 and 1854 established . . . that a carrier might by a special notice make a contract limiting his responsibility even in the cases . . . of gross negligence, misconduct, or fraud on the part of his servants. . . . In *Kerr* v. *Willan* (1817), 6 M. & S. 150, decided in 1817, and I think in all the subsequent cases, it was held that the notice, to be effectual, must be brought home to the particular customer, which, in my opinion, shows that the condition operated entirely by way of contract, and not by way of restriction on the public profession. So completely was the necessity of bringing the notice home to the particular party established, that Mr. Smith, in the first edition of his leading cases (which was published in 1837), says, 'If this notice was not communicated to the employer, it was, of course, ineffectual.' And this expression of the self-evident nature of the proposition has been allowed to

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Canadian Cases.

(28) In an action against defendants as common carriers for delay in carrying goods, a plea setting up special conditions on which the goods were received was held good as exempting defendants from liability (*Bates* v. *G. W. Rail. Co.*, 24 U. C. Q. B. 544).

Defendants, a railway company, received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions endorsed, which provided that they would not be responsible for damage done to any china, glass, etc., delivered to them for carriage; and defendants gave a receipt with the same conditions upon it:—*Held*, that such delivery and acceptance formed a special contract, which was valid at common law, and exempted defendant from injury to the goods, even though caused by gross negligence (*Hamilton* v. *Grand Trunk Rail. Co.*, 23 U. C. Q. B. 600).

The Carriers Act (11 Geo. 4, and 1 Will. 4, c. 68) is not in force in Canada. See *Farr* v. *G. W. Rail. Co.*, 35 U. C. Q. B. 534; *Scott* v. *G. W. Rail. Co.*, 23 U. C. C. P. 182; *Allen* v. *G. W. Rail. Co.*, 33 U. C. Q. B. 483; Railway Act (Can.), 1868, and amending Act (34 Vict. c. 43), and remarks of *Moss*, C.J.A., in *Fitzgerald* v. *Grand Trunk Rail. Co.*, *ante*, p. 391.

It has, however, been re-enacted in British Columbia. Cases respecting this branch of the law in other provinces of the Dominion and not coming within the Railway Act of Canada (51 Vict. (D.) c. 29) must, therefore, be decided according to the principles of the common law (*Dodson* v. *Grand Trunk Rail. Co.*, 2 Geldert & Oxley (N.S.) 405).

stand in all the editions of his work, without remark or qualification by any of his very learned editors. Mr. Smith proceeds to add, 'But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its content'" (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at pp. 494, 495, 496 : *Blackburn*, J.).

3. "It seems now incontestable that at common law, it is open to carriers to limit their common law liability by special agreement with the consignors of goods ; and this, according to some decisions, even to the extent of relieving themselves from the consequences of their own negligence" (*The Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865), 3 Moore P. C. Cas. (N.S.) 272, at p. 293 : *Turner*, L.J., pronouncing the judgment of the Privy Council). (29)

4. "*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852) 7 Ex. 707, the case which led to the passing of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), is also a strong authority in favour of the defendants. In that case the horse was killed by the gross and culpable negligence of the driver of another train, a servant of the company, and if the horse had been the property of a stranger, or even if it had been trespassing on the railway and could not get out of the way of the coming train, the company would have been liable ; yet the Court of Exchequer held that, as there was a stipulation in the contract of carriage that the horse should be carried at the risk of the person sending it, they must give judgment for the defendants, leaving it to the legislature, if they thought fit, to alter the law ; an appeal which the legislature very soon answered by passing the Railway and Canal Traffic

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(29) Case against defendants as carriers by water for negligence in conveying the plaintiff's goods. Third plea that the defendant received the goods on an express agreement that they were not to be in anywise answerable for any loss or damage which might occur in the course of the carriage or delivery, and that the damage happened without any negligence or want of care on the part of the defendants or their servants. It was proved that the loss was occasioned by collision on the lake, and that the plaintiff by his agent was subject to the risks of navigation. Verdict for the defendant upheld (*Crafford* v. *Brown*, 11 U. C. Q. B., p. 96).

The plaintiff had signed an agreement whereby the defendants agreed to carry plaintiff's cattle on their railway but subject to a condition by which the plaintiff undertook all risk of loss, injury, or damage, in conveyance and otherwise whether arising from the negligence, default, or misconduct, criminal or otherwise, on the part of the defendants or their servants :— *Held*, in an action for negligence that plaintiff was bound by the condition, though he might not have read or understood the paper (*O'Rorke* v. *G. W. Rail. Co.*, 23 U. C. Q. B. 427).

Act" (*Gallin* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 212, at p. 216: *Blackburn*, J.).

For the Railway and Canal Traffic Act, 1854, see *post*, p. 439, Section VIII.

5. "When the Railway and Canal Traffic Act was passed [July 10th, 1854] the law in respect to the liability of carriers had been much relaxed, and the weight of the decisions at that time established that carriers might by special notice make contracts limiting their responsibility even in cases of gross negligence, misconduct, or fraud on the part of their servants" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at p. 190: *Lopes*, L.J.).

6. "This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as by land, viz., that words of general exception from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants" (*Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B. 619, at p. 623: *Bowen*, L.J.).

Railway Cloak-room Ticket.

As to the meaning of a condition upon a railway cloak-room ticket that a railway company "will not be responsible for any package exceeding the value of 10*l.*," see *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 75, and *Pratt* v. *South Eastern Rail. Co.*, [1897] 1 Q. B. 718.

(2) *Ticket and other Document in Common Form.*
The Offer by the Carrier.

I. Where the carrier delivers to his customer a document in common form containing the terms by which the carrier will enter into the proposed contract, such a form constitutes the carrier's offer.

The Acceptancy by the Customer.

II. If the form is accepted without objection by the customer he is, as a general rule, bound by the contents of the form; his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not.

Exceptions to the above General Rule.

(*a*) Where the customer may reasonably suppose that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms.

(*b*) Where there is fraud, *e.g.*, where the conditions are printed or written in such a manner as to mislead the customer.

(*c*) Where without fraud the document is misleading and the customer is actually misled by it.

III. The issuing of time tables amounts to a promise to the public at large, and is in effect as if made to each individual conditionally. On his fulfilling the condition by his coming and tendering the price of a ticket it becomes an absolute contract.

IV. The mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty, to have a train ready to start at the time at which a passenger is led to expect it. In order to maintain an action it is incumbent on the passenger to show either a breach of contract or a breach of some legal duty.

V. There may be an additional parol contract besides a ticket, document, or paper signed by the customer.

VI. Where a document is complete on the face of it but has something upon the back of it which has not actually been brought to the notice of one of the contracting parties, it is not binding in respect of what is on the back.

VII. If the document has on its face a plain and unequivocal reference to conditions printed on back of it, it is binding.

VIII. In other cases if the person receiving the ticket or document did not see or know that there was any writing on the ticket or document he is not bound by the conditions ; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions. If he knew there was writing on the ticket or document, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket or document to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

The above principles are well illustrated by and clearly laid down in the following decisions given in chronological order :—

(See also *post*, Section XIV. — Passengers, (a) Passenger's Contract with Carrier.)

The Issuing of Time Tables amounts to a Promise to the Public at large.

1. "It seems to me that, if the company promised to give tickets for a train, running at a particular hour to a particular place, to any one who would come to the station and tender the price of the ticket, it is a good contract with any one who so comes. I take it to be clear that the issuing of the time tables in

this way amounts in fact to such a promise; any one who read them would so understand them. Then, is it a good contract in law? The consideration is one which is a prejudice to the person who makes his arrangements with a view to the fulfilment of the contract, and comes to the station on the faith of it. Is it not then within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There the promise is to the public at large, exactly as it is here; it is in effect the same as if made to each individual conditionally; and, on an individual fulfilling the condition, it is an absolute contract with him, and he may sue. That being so, there is, I think, a contract" (*Denton* v. *Great Northern Rail. Co.* (1856), 5 El. & Bl. 860, at pp. 865, 866: Lord *Campbell*, C.J.).

See also *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, and *Johnston* v. *Boyes*, [1899] 2 Ch. 73.

The mere Taking of a Ticket without Reference to the Time Tables, does not amount to a Contract.

2. "I am of opinion that the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it: and, in order to maintain an action, it is incumbent on the plaintiff to shew either a breach of contract or a breach of some legal duty. If there were any such contract here, it would appear from the time-bills published by the company: and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz., that the company do not warrant that their trains shall arrive with punctuality at the times indicated at the different stations. There clearly was nothing like a special contract in the talk with the officials on the platform at Cardiff. A mere casual conversation with a person whose duty it is to open and shut the carriage-doors or the like cannot amount to evidence of a special contract with the company" (*Hurst* v. *The Great Western Rail. Co.* (1865), 19 C. B. (N.S.) 310, at pp. 317, 318: *Erle*, C.J.).

Written Document and Additional Parol Contract.

3. "The action was for not performing a contract to carry certain cattle to King's Cross; and the question is, whether there was any evidence of a contract to carry to King's Cross. There was very distinct parol evidence given of such a contract; but on the part of the defendants there was a paper put in which was signed by the plaintiff at the time when the cattle were delivered, and in that paper the *terminus ad quem* was stated to be Nine Elms; and the

defendants contended that this was conclusive evidence that the contract was to carry to Nine Elms, and no farther. I think that it is not so, because it seems clear on the evidence that there may have been a contract to carry to Nine Elms, and an additional contract to carry the cattle on from thence to King's Cross. The parol evidence, therefore, does not vary or contradict the written document, but only makes an addition to it. Parol evidence must be admitted as to one important term of the contract, viz., the price, which is not mentioned in the written document; and as there is strong evidence of the additional contract to carry on the cattle to King's Cross, it also must be admitted" (*Malpas* v. *London and South Western Rail. Co.* (1866), L. R. 1 C. P. 336, at pp. 338, 339: *Erle*, C.J.). (30)

Absence of Knowledge that there is any Writing upon the Back of a Ticket which is Complete upon the Face of it makes the Writing upon the Back not Binding.

4. "It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him" (*Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470, at p. 475: Lord *Cairns*, L.C.). (31)

Canadian Cases.

(30) Plaintiff purchased a through railway ticket from Boston (U. S.) to Cape Breton, in the course of which journey he was obliged to cross the harbour of St. John by a ferry owned by the defendants. On reaching the ferry he produced his ticket to the collector of fares, who tore off and retained a portion of it, returning the remainder of the ticket to the plaintiff, and then allowing him to go on board the ferry boat and cross the harbour:—*Held*, that this was evidence that the ticket was issued in Boston by the defendants' authority, and amounted to a contract by them with the plaintiff to convey him safely across the harbour (*MacDonald* v. *Mayor of St. John*, 25 N. B. Reps. 318).

(31) *Bate* v. *Canadian and Pacific Rail. Co.*, 18 S. C. R. 697. In this case it was held that the special conditions printed on the ticket not having been brought to the notice of the plaintiff she was not bound by them and could recover her loss from the company. See also *Anderson* v. *Canadian and Pacific Rail. Co.*, 17 O. R. 752.

A Reference on the Face of the Ticket to Conditions on the Back of it makes such Conditions Binding.

5. "On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord *Holt* in *Coggs* v. *Bernard* (1704), 2 Ld. Raym. 909, the bailee (unless he is one who has the responsibilities of a public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury: the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by *Parke*, B., in delivering the judgment of the Exchequer in *Freeman* v. *Cooke* (1848), 2 Ex. 654 at p. 663, that is, if he '*means* his representation to be acted upon, and that it is acted upon accordingly, and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true.' And accordingly, in *Allan* v. *Mawson* (1814), 4 Camp. 115 where the plaintiff had taken an instrument which on a cursory view appeared to be a draft on Sir John Perring and others, bankers, London, but with the word 'at' in very small letters enclosed in the hook of the S of the Sir, so as to make it at least doubtful whether the instrument did not purport to be a promissory note, *Gibbs*, C.J., asked the jury whether the word 'at' was so inserted for the purpose of deception, for if so, it was to be struck out, and the instrument was a bill of exchange in fact. A similar decision, mentioned by Lord *Hardwicke*, in 2 Atk. 32, had been come to by Lord *Macclesfield* in a case where a man gave a girl a promissory

note for '20*l.* value received, which I promise *never* to pay,' and the word 'never' was rejected. Both of these cases seem to me to proceed on the ground that in neither case could the defendant as a reasonable man, believe that the other party had read the words inserted for the purpose of deceit, or that the other party meant to represent to the defendant that he had done so.

"The decision in *Henderson* v. *Stevenson* (1875), L.R. 2 H.L. Sc. 470 seems to me to proceed on the same principle, but to carry it one step further. There was no fraud or intentional deception found in that case, as there had been in the two just cited, but there was nothing to shew that the steamboat company, who were the defendants in that case, or those who represented them, as reasonable men, would believe, from the conduct of the passenger, that he had represented to them that he had read or looked at the back of the ticket, and in point of fact he had not.

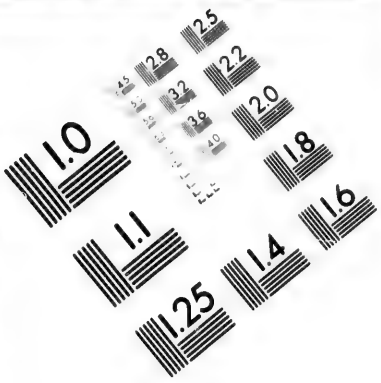
"Lord *Cairns*, L.C., says: 'on the face of this ticket there are letters indicating the name of the steamboat company, and the words 'Dublin to Whitehaven.' This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him.' He then points out that there was no reference on the face of the ticket to that which was printed on the back, and that the evidence was that the passenger had not, in fact, read what was on the back of the ticket, and proceeds: 'The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without anything dehors. Those who were satisfied to hand to the passenger such a contract, complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger, on his receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him.' It certainly seems to me that this is, in other words, to say that, though the ticket was the contract, the passenger receiving such a ticket had not so conducted himself as to justify the steam packet company, or their servants, as reasonable men, in thinking that he had read, or ought to have read, or otherwise made himself acquainted with, what was on the back of the ticket, and consequently that the passenger was not

precluded from showing that, in fact, he knew nothing of what was on the back. But, in the present case, the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking her ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted" (*Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515, at pp. 529, 530, 531, 532: *Blackburn*, J.).

A Reference on the Face of the Ticket to Conditions on the Back of it is Reasonable Notice—Proper Direction to the Jury.

6. "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. I hold therefore that the case of *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515 was rightly decided, because in that case the plaintiff admitted on cross-examination, that he believed there were some conditions on the ticket. On the other hand, the case of *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470 is a conclusive authority that if the person receiving the ticket does not

know that there is any writing upon the back of the ticket, he is not bound by a condition printed on the back. The facts in the cases before us differ from those in both *Henderson* v. *Stevenson* and *Harris* v. *Great Western Rail. Co.*, because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether, under those circumstances, we can lay down as a matter of law either that the plaintiff is bound or that he is not bound by the conditions contained in the ticket, or whether his being bound depends on some question of fact to be determined by the jury, and if so, whether, in the present case, the right question was left to the jury. Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried



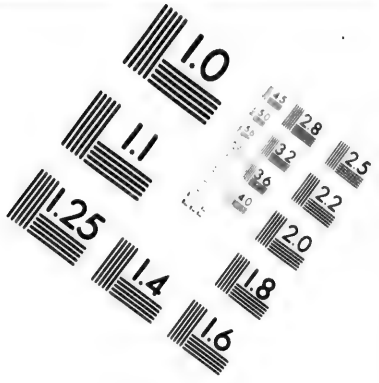
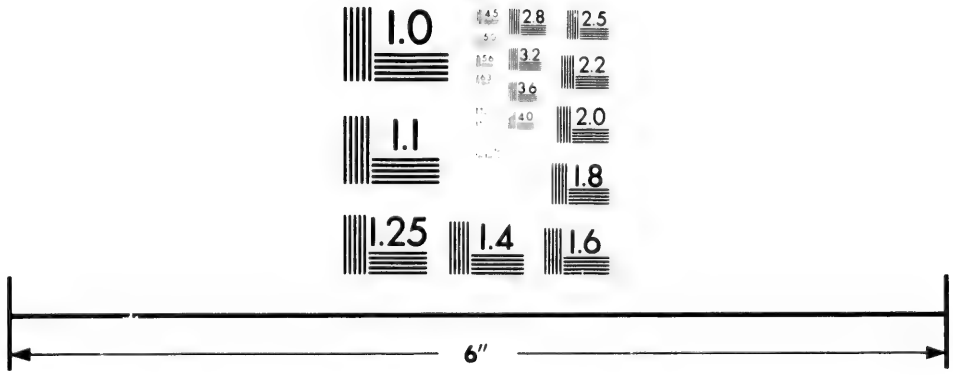
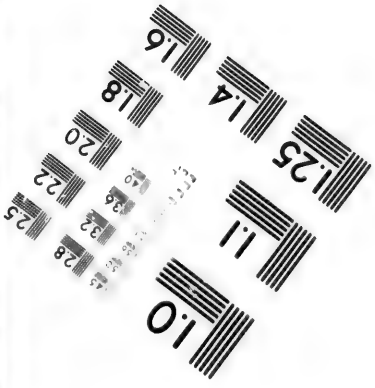
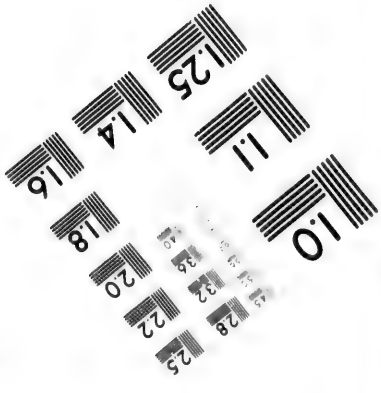


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on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

"Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions" (*Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416, at pp. 421, 422, 423: *Mellish*, L.J.). (32)

Principles deducible from an Examination of the Authorities.

7. "We now proceed to state the principles which we deduce from this examination of the authorities [*Zunz* v. *South Eastern*

Canadian Cases.

(32) In *Bate* v. *Canadian and Pacific Rail. Co.*, 14 O. R. 627, the learned judge charged the jury, that unless the plaintiff's attention was drawn to the ticket sufficiently to make her understand that she was signing something more than ordinary to passengers obtaining a ticket to go to some particular place and return, then she was not bound by it.

Rail. Co. (1869), L. R. 4 Q. B. 539 ; *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470 ; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515 ; *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416 ; and *Burke* v. *South Eastern Rail. Co.* (1879), 5 C. P. D. 1], and to apply them to the case before us. Thrown into a general form the result of the authorities considered appears to be as follows : A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule however there are a variety of exceptions.

"(1.) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception may be found in the judgments in *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416, and in the language of some of the Lords in *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470, though these must be received with caution for reasons given by Lord *Blackburn* in *Harris* v. *Great Western Rail. Co.* (1876), 1 Q. B. D. 515, at p. 532.

"(2.) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document.

"(3.) A third exception occurs, if, without being fraudulent, the document is misleading and does actually mislead the person who has taken it. The case of *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470, is an illustration of this. (33)

"(4.) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord *Bramwell* suggests some illustrations of this in his judgment in *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416, at p. 428. One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case" (*Watkins* v. *Rymill* (1883), 10 Q. B. D. 178, at

Canadian Cases.

(33) *Bate* v. *Canadian and Pacific Rail. Co.*, *ante*, p. 403.

pp. 188, 189 : *Stephen*, J., delivering the judgment of the court (*Hawkins*, J., *Stephen*, J., and *Watkin Williams*, J.)).

8. "My Lords, the only question that arose on the trial of this action was whether the plaintiff was bound by certain conditions limiting the liability of the defendants, who had engaged to carry her on their steamer from Philadelphia to Liverpool. The plaintiff paid her passage-money and received a ticket from the defendants. On that ticket undoubtedly there were a great number of conditions detailed. The ticket began by stating that each passenger would be required to provide bedding and eating utensils, and then it continued : 'It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions.' Then follow a number of conditions, beginning under the letter (*a*) and going down to the letter (*i*) ; the condition in question was one under letter (*d*) : 'The company is not under any circumstances liable to an amount exceeding 100 dols. for loss of or injury to the passenger or his luggage.'

"My Lords, three questions were left to the jury : '(1) Did the plaintiff know that there was writing or printing on the ticket ?' That question they answered in the affirmative. '(2) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage ?' That they answered in the negative. '(3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions ?' That they answered in the negative also.

"Now, those are questions which the majority of the Court of Appeal [*Mellish* and *Baggallay*, L.JJ.], in the case of *Parker* v. *South Eastern Rail. Co.* (1877), 2 C. P. D. 416, pointed out, by their judgment, ought to be left to the jury. That was a case, in its broad features, very similar to this, inasmuch as the plaintiff there had deposited some luggage at the luggage office of one of the railway companies, and received in return for the deposit of the luggage a ticket on which there was printed 'See back,' and on the back were certain conditions by which it was sought to limit the liability of the company. The majority of the Court of Appeal held that they could not say, as matter of law, that by reason of taking that ticket in exchange for the goods the plaintiff was bound by the conditions ; that there were questions to be determined by the jury, and that upon their determination would depend the liability of the defendants" (*Richardson, Spence & Co. and "Lord Gough" Steamship Co.* v. *Rowntree*, [1894] A. C. 217, at pp. 219, 220 : Lord *Herschell*, L.C.).

SECTION VII.

THE CARRIERS ACT, 1830. (34)

(11 GEO. 4 & 1 WILL. 4, c. 68.)

In the last section the restriction of the obligations and liability of common carriers by public notices and special contracts was dealt with. Now the *statutory* limitations of a carrier's liability will be dealt with. The first statute that was passed in this connexion was the Carriers Act, 1830. Before dealing with that statute itself, the history of the circumstances under which it was passed should be given, and that cannot be better done than by the following authoritative statement of Mr. Justice *Blackburn*.

History of the Circumstances under which the Carriers Act, 1830, *was passed.*

"At the common law a carrier who received goods as such was responsible for every injury occasioned to them by any means except the act of God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage, and was liable to an action if he refused to receive them without reasonable excuse; and such an action may still be maintained (*Crouch* v. *London and North Western Rail. Co.* (1854), 14 C. B. 255). But many years ago a practice began by which carriers sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common law liability as carriers. The effect of such a notice is discussed in *Gibbon* v. *Paynton* (1769), 4 Burr. 2299. It is apparent from that case that the practice was not then new, though I cannot find when it first arose. After 1769, and before 23rd July 1830, when the first Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68) received the Royal assent, the cases on carriers' notices are very numerous.

"Mr. Justice *Story*, in his Commentaries on the Law of Bailments, § 549 (published in 1832, after the Carriers Act, but in America, where that Act had no effect), states, as I think accurately, what was the effect of the decisions up to the time. 'It was,' says he, 'formerly a question of much doubt how far common carriers on land could by contract limit their responsibility, upon the ground that, exercising a public employment, they are bound to

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Canadian Cases.

(34) "This case is to be decided according to the principles of the common law, neither the English Carriers Act, 1830, nor the Railway and Canal Traffic Act of 1854 being in force in this prov[illegible]. The numerous cases cited at the argument have, therefore, only a partial application, and will aid us chiefly by way of illustration and analogy" (*Dodson* v. *Grand Trunk Rail. Co.*, 2 Geldert & Oxley (N.S.): Sir *William Young*, C.J.).

carry for a reasonable compensation, and have no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they may, and could not insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord *Coke* declared it in a note to *Southcote's Case*, 4 Co. Rep. 84, and it was admitted in *Mors* v. *Slue* (1673), 1 Vent. 190. It is now recognized and settled beyond any reasonable doubt.' So far the passage is cited and adopted in the judgment of the Court of Common Pleas in *Austin* v. *Manchester, etc. Rail. Co.* (1852), 10 C. B. 454, at p. 473, a case decided in 1852, to which I shall hereafter have to call attention; and so far I think this, according to the decisions subsequent to 1832 still remained law in 1854, when the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) was passed. But Mr. Justice *Story* proceeds to say: 'Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct.'

"In my opinion, the weight of authority was in 1832 in favour of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not law, and that a carrier might by a special notice make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the Railway and Canal Traffic Act, 1854 [17 & 18 Vict. c. 31], was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.' Such is my opinion."

* * * * *

"In *Kerr* v. *Willan* (1817), 6 M. & S. 150, decided in 1817, and I think in all the subsequent cases, it was held that the notice, to be effectual, must be brought home to the particular customer, which in my opinion, shows that the condition operated entirely by way of contract, and not by way of restriction on the public profession. So completely was the necessity of bringing the notice home to the particular party established, that Mr. *Smith*,

in the first edition of his Leading Cases (which was published in 1837), says, 'If this notice was not communicated to the employer, it was, of course, ineffectual.' And this expression of the self-evident nature of the proposition has been allowed to stand in all the editions of his work, without remark or qualification by any of his very learned editors. Mr. *Smith* proceeds to add, 'But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by the contents.' That very learned gentleman evidently considered that at the time when he wrote (1837) it had become settled that the notice operated as a special contract with those to whom it was brought home, and not as a public condition limiting the profession of the carrier. However much this might have been open to question before the first Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68), it seems to me, with all deference to those who hold the opposite opinion, to be incontrovertible after that Act. By that Act, after giving, by the first three sections, effect to public notices restricting the liability of carriers as to certain articles, it is by the fourth section provided that from and after the 1st of September 1830, 'no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in any wise affect, the liability at common law' of any carrier; but every such carrier shall, except as to goods brought within that Act, be liable as at the common law, 'any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability notwithstanding.' By section 6 it is provided that nothing in that Act should 'affect any special contract between such carrier,' and any other parties for the conveyance of goods and merchandise. It certainly seems to me that, whatever might have been the case before this enactment, it is clearly enacted that no condition shall in future operate merely as being a public condition or public declaration, and that, to be effectual at all, it must be incorporated in a special contract."

* * * * *

"We find that by the express enactment of the legislature in 11 Geo. 4 & 1 Will. 4, c. 68 [The Carriers Act, 1830], no public notice or declaration could as such in any ways affect the liability of a carrier as regarded goods in general, though special contracts might be made as at common law; and it had been decided that such notices or declarations, when brought home to the customer, did operate as being the basis of a special contract to carry on the conditions contained in such notices. It had also been decided that such conditions, when thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had

farther been decided that a special contract ought to be inferred from the act of a party sending goods after the receipt of a notice, even where the party protested against the notice. And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage of goods, and, it was alleged, abused their advantages so as (in the language of Story, already cited) 'to evade altogether the salutary policy of the common law'" (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at pp. 493—507: *Blackburn*, J.).

THE CARRIERS ACT, 1830. (35)

[Common Carriers by Land for Hire.]

(11 Geo. 4 & 1 Will. 4, c. 68.)

AN ACT for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof. [23d July 1830.]

Preamble.

WHEREAS, by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans and other public conveyances *by land* for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage coach proprietors, and common carriers for hire is greatly increased: AND WHEREAS, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual

Canadian Cases.

(35) Revised Statutes British Columbia, 1897, chap. 37.

and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act :—

Value (if over 10l.) and Nature of Articles to be declared and Payment of Increased Charge made.

Section 1.—No mail contractor, stage coach proprietor, or other common carrier *by land* for hire shall be liable for the loss of or injury to *any article or articles or property* of the descriptions following ; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, *contained in any parcel or package* which shall have been delivered, either to be carried for hire *or to accompany the person of any passenger in any mail or stage coach or other public conveyance*, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds [10*l.*], unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried *or of accompanying the person of any passenger as aforesaid*, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

The words in italics seem to make the Act apply to a passenger's luggage if it includes any of the enumerated articles. See *post*, Section XV.—Passenger's Luggage, and *Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54 ; *Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612, at p. 622 : *Cockburn*, C.J. ; and *Millen* v. *Brasch* (1881), 8 Q. B. D. 35 ; (1882), 10 Q. B. D. 142.

[N.B.—The words printed in italics are, of course, not so printed in the copy of the Queen's printers.]

Object of the Carriers Act, 1830.

1. "Now, it seems to me that the object of the Act is twofold;—first, it is that the party receiving the article may be apprized of the nature of the article, in order that he may give it the greatest degree of protection; and, secondly, that, as he incurs an additional danger and risk, he should have an increased compensation" (*Owen* v. *Burnett* (1834), 2 Cr. & M. 353, at p. 359: *Bayley*, B.).

2. "The Act was passed for the relief of carriers against the responsibility to which at common law they were liable, and I think it ought to have a liberal construction. It is reasonable that its operation should be general, although only a particular mischief is recited" (*ibid.*, at p. 360: *Vaughan*, B.).

3. "The general object of the Act [The Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68)] was to give protection to carriers in respect of small parcels of great value placed under their care, without any notice of their value, thus compelling them to incur considerable risk with but little remuneration; and the legislature has effected this by requiring the value of such parcels to be declared, and an additional sum to be paid to the carrier by way of insuring their safe delivery; and nothing can be more just than such an enactment" (*Machu* v. *London and South Western Rail. Co.* (1848), 2 Ex. 415, at p. 426; *Pollock*, C.B.).

As to proof of actual value, see Section 9 of the Carriers Act, 1830, *post*, p. 438.

The Act also extends to certain Articles of considerable size and small value—Apprizing Carrier of Contents of Package.

4. "The preamble [of 11 Geo. 4 & 1 Will. 4, c. 68] extends to articles carried by waggons and vans as well as by mails and stage-coaches, which articles, in general, will not be of small compass; and in the description following there is no qualification as to articles of great value in small compass. All are mentioned generally, from which I should infer that it was intended to include any of the *descriptions following*. 'Clocks,' 'timepieces,' 'paintings,' 'pictures,' 'plated articles,' may be of considerable size, and no judgment can be formed of their value in consequence of their size, and the Act must apply to all articles of that description. 'Glass' is mentioned in the same manner generally, and why is the Act not to apply to glass of every description, if of the requisite value? It is a commodity which requires particular attention, and in respect of which the carrier is exposed to great

risk and hazard from its brittle nature. The word 'glass' is unqualified and unlimited; and I cannot see that we are justified in saying it applies to glass in a small compass only, and not of every description. The object is, that the party shall be put upon his guard, not only against theft, but against the ordinary accidents of the road; and as some articles, and amongst them glass, require peculiar care, it is provided that the carrier shall not be responsible, unless the value and nature of such article or articles, or property, shall have been declared, and the increased charge, or engagement to pay the same, have been accepted by the person receiving the parcel or package. Now it seems to me that the object of the Act is twofold;—first, it is that the party receiving the article may be apprized of the nature of the article, in order that he may give it the greatest degree of protection; and, secondly, that, as he incurs an additional danger and risk, he should have an increased compensation. Now it seems to me, then, that by the terms of the Act the plaintiff was required to give a specific notice that the package contained glass of the value he seeks to recover, and that, as he did not do that, the defendant was not responsible.

"Secondly, it is said that there was gross negligence on the part of the defendant, and, therefore, that he is not within the protection of the Act. As for the cases of what is called 'gross negligence,' which throws upon the carrier the responsibility when, but for that, he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance. There is no question that here the carrier would not have been justified in dashing the glass to the ground, because that would have been acting as a wrongdoer. In one case the parcel was delivered to a wrong person [see *Duff* v. *Budd* (1822), 6 Moore, 469]; in another, it was carried beyond the place of delivery [*Ellis* v. *Turner* (1800), 8 T. R. 531]; and, in another, a different mode of conveyance was substituted [*Nicholson* v. *Willan* (1804), 5 East 507; *Sleat* v. *Fagg* (1822), 5 B. & Ald. 342]. In *Smith* v. *Horne* (1818), 8 Taunt. 144, the carrier's cart was left standing in the public street unprotected, whilst the porter went to deliver another parcel. In all these instances there was misfeasance; here, it seems to me there was no misfeasance or gross degree of negligence. The negligence imputed was the carrying of the glass along a hard smooth road on a truck. If the carrier had been apprized of the contents of the case, it might not have been so prudent a mode of conveyance; but it was the ordinary mode of carriage; and, to induce him to exercise more than ordinary care and diligence, he was entitled to

notice. I am, therefore, of opinion that he is not responsible" (*Owen* v. *Burnett* (1834), 2 Cr. & M. 353, at pp. 358, 359, 360: *Bayley*, B.).

The Declaration.

There ought to be an express formal declaration of the value.

1. "It is quite manifest that no formal declaration of value was made, and no extra carriage paid. It is probable that the defendants had a conviction as to what the contents of the box [prints and coloured prints] were, but it is not for us to make equivalents for that which is required by the Act of Parliament. There ought to have been an express formal declaration of the value, which has not been made" (*Boys* v. *Pink* (1838), 8 C. & P. 361, at pp. 363, 364: Lord *Denman*, C.J.).

Owner of goods must declare their nature and pay for them.

2. "The language of the first section seems to us to be perfectly clear and unambiguous, without exception or restriction, and that none can fairly be implied from any other part of the Act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature, and pay for them in the manner prescribed, we not only further the object avowed in the title and preamble to the Act, but give it the effect of removing doubts and difficulties which (as we have seen) it is admitted did exist as to the liability of a carrier for the loss of goods, who has sought to limit that liability by the publication of a notice in the usual form" (*Hinton* v. *Dibbin* (1842), 2 Q. B. 646, at p. 665: Lord *Denman*, C.J., delivering the judgment of the court).

Object of Declaration is to fix the Amount of Additional Charge to be made by the Carrier.

3. "In determining the sufficiency of a declaration of value it is material to consider what is the object of requiring such a declaration; that object is to enable the carrier to fix the amount of additional charge to be made by him. The words used by the plaintiffs in this case ('there are about 100*l.* worth of goods in that parcel') constituted, in my opinion, a sufficient declaration of value, because they supplied information on which the defendant could have calculated the additional charge to be made; if the defendant had thought the information too indefinite he might have required more particularity" (*Bradbury* v. *Sutton* (1871), 19 W. R. 800, at p. 801: *Kelly*, C.B.).

Contract to Carry by Land and Water divisible for the Purposes of the Act.

"It was said that the provisions of the Act [Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68)] were not applicable to the case, because the contract was one to carry not only to the terminus of the railway by land, but also by water; and that such a contract being to carry both by land and by water, the contract was not devisible; and therefore, although the article was lost on land, that it was not within the terms of the Carriers Act. I think that that argument fails both on principle and on authority; on authority, because the point was directly before the Court of Common Pleas in the case of *Pianciani* v. *London and South Western Rail. Co.* (1856), 18 C. B. 226, in which the court expressed the strongest opinion that the contract was divisible; and that so far as the carriage by land was concerned, the Carriers Act would afford a protection and defence to the company, in the event of the terms of that Act not being complied with; and I must say I entirely concur in the view so taken and expressed by the court. It would be a matter of the most serious inconvenience if companies, established for the purpose of conveying goods by land, but having one of the termini of their railway connected with water communication, should be prevented (as they would practically be) from affording the public the great accommodation which arises from being able to send goods to the ultimate place of destination, the water carriage included, without the necessity of separate contracts with separate companies. If that accommodation were withdrawn from the public, as it might be, if, so far as the land carriage is concerned, companies were deprived of the protection the Act of Parliament affords, it would be a matter of very serious inconvenience and damage to the public; and I see no reason why that damage and inconvenience should be inflicted upon the public, at the same time that loss would accrue to the companies from not having the opportunity which they at present possess of making the entire contract. I see no reason why the contract should not be held to be divisible, and the carrier protected so far as the land carriage is concerned by the Act of Parliament" (*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54, at pp. 59, 60: *Cockburn*, C.J.).

"*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54 is an authority to shew that, when there is one entire contract to carry partly by land and partly by sea, the contract is divisible, and that as to the land journey the carrier is within the protection of the Act if the loss arise during the transit

by land" (*Millen* v. *Brasch* (1881), 8 Q. B. D. 35, at p. 37: *Lopes*, J.).

What is a "Package" within the meaning of the Carriers Act? Fancy Articles Packed in a Waggon.

1. The plaintiff, who was a decorator and exhibitor of fancy articles at Manchester, sent to Wigan various articles, including decorations, models, mechanical figures, and oil paintings, for exhibition at the Wigan Infirmary Bazaar. On the closing of the exhibition these articles were packed in a waggon and a lorry for return. The oil paintings, which were ten in number, were placed in the waggon, the two middle ones being placed, with their faces inward, against the opposite sides of a frame shaped like an inverted V, and the remainder ranged in line behind the two first, and separated from each other and kept in place by strips of wood nailed to the floor. The waggon was open at the top, so that it could be seen that there were pictures inside, but the character of the pictures could not be seen.

Held that this waggon with its contents was a "package" within the meaning of the Act, by *Bramwell*, *Cleasby* and *Pollock*, BB. (see *Whaite* v. *Lancashire and Yorkshire Rail. Co.* (1874), L. R. 9 Ex. 67).

Case and its Contents are Accessories and both should be Insured. Maps in a Case.

2. "The other objection, as to the distinction between the case and its contents [maps], was, we think, satisfactorily answered. One is in truth accessory to the other, and if not, then, as the plaintiff has not paid insurance for *both*, as he would have done if he had paid for the package and not for the maps, the defendants are protected by the notice" (*Wyld* v. *Pickford* (1841), 8 M. & W. 443, at p. 462: *Parke*, B.).

A Lace Corporal in a Gilt Frame.

3. Plaintiff was a lace manufacturer, and sent to an ecclesiastical art exhibition at Norwich a lace corporal, intended for use in celebrating the Holy Communion, and a registered design. The corporal was placed in a gilt frame covered with glass for exhibition, in the manner of a picture, and the whole was placed in a packing case, and delivered to the defendants to be carried. No declaration in accordance with the provisions of the Carriers Act was made by the plaintiff. The package was lost during its carriage by the defendants. The verdict was entered for the plaintiff for 1*l.* 17*s.* 6*d.*, being the value of the gilt frame (independently of the glass) and the packing case.

"I think the frame was a separate article, sent for the purpose of the corporal being exhibited in it, and not to be treated merely as part of or accessory to the corporal; the corporal could have been easily sent and exhibited without such a frame, but the latter was useful both for preserving it from dirt and enabling it to be more easily seen. Nor do I think that the frame can be said to come within the Carriers Act as 'glass,' for the glass of it must be considered as accessory to the frame, and not the frame to the glass" (*Treadwin* v. *Great Eastern Rail. Co.* (1868), L. R. 3 C. P. 308, at pp. 311, 312: *Bovill*, C.J.).

Framed Pictures.

4. Plaintiff sent framed pictures by the defendant's line without declaring them under the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68, s. 1). The pictures and frames were lost, and the plaintiff sued the defendants for their value.

It was contended at the trial that although the plaintiff could not recover for the pictures, he could for the frames; and *Treadwin* v. *Great Eastern Rail. Co.* (1868), L. R. 3 C. P. 308, was relied on.

"I think the whole parcel was within the Act. As to the lace 'corporal' in *Treadwin* v. *Great Eastern Rail. Co.* (1868), L. R. 3 C. P. 308, it is a thing which by the description given of it, appears in general, and in its ordinary mode of use, not to require a frame, and to have none, but which was framed only to secure it a safe transit; the frame was, therefore, no part of the article, but only incidental to it. But pictures are, in general, encompassed with frames; and the frame not only forms part of the picture, but is ordinarily as necessary for its security as the outside package in which it is sent" (*Anderson* v. *London and North Western Rail. Co.* (1870), L. R. 5 Ex. 90, 91: *Kelly*, C.B.).

"It might as well be contended that the plaintiff could recover for the canvas alone, or that if jewellery were sent in jewel cases, the owner could recover for the cases, though not for the jewels, as that the plaintiff can here recover for the frames of the pictures apart from the pictures themselves" (*ibid.*: *Martin*, B.).

Whether an Article falls within any of the Descriptions enumerated is a Question for the Jury.

"I think my Brother *Cleasby* rightly treated the question, whether the lost articles fell within the description of 'paintings' in the Carriers Act [11 Geo. 4 & 1 Will. 4, c. 68], as one of

fact for the jury to determine. This was expressly decided in *Brunt* v. *Midland Rail. Co.* (1864), 2 H. & C. 889" (*Woodward* v. *London and North Western Rail. Co.* (1878), 3 Ex. D. 121, at p. 125: *Hawkins*, J.).

"*Time-piece.*"

"The next point is, are the defendants protected by the Carriers Act [11 Geo. 4 & 1 Will. 4, c. 68]? On that, I entirely agree they are. The statute says, 'No carrier by land shall be liable to the loss or injury of certain articles above the value of 10*l.* unless the value is declared and the increased charge paid.' The chronometer, it cannot be doubted, is one of the articles enumerated in the Act, because it describes time-pieces of every description, and the chronometer is found to be above the value of 10*l.* Then, according to the terms of the Act, the defendants being carriers by land, are not liable for the loss" (*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54, at p. 62: *Lush*, J.).

"*Trinkets.*"

"It is said, that, inasmuch as they [bracelets, shirt-pins, rings, and brooches] are also articles of utility, they cease to be trinkets. But I do not agree to that. Their main and principal object plainly is that of ornament. It is true they may also be applied to some useful purpose; yet, inasmuch as they are essentially ornamental, I do not think the fact of their being capable of being turned to some use raises any difficulty. But, even supposing their main object was utility for the purpose of dress, if made part of the ornament of apparel, they equally fall within the strictest definition of 'trinkets'" (*Bernstein* v. *Baxendale* (1859), 6 C. B. (N.S.) 251, at p. 258: *Cockburn*, C.J.).

"*Bills, Notes,*" *etc.*

"*Stoessiger* v. *The South Eastern Rail. Co.* (1854), 3 E. & B. 549 is a distinct authority that it [a bill of exchange] is not a 'security' until a drawer's name has been attached to it, for that a 'security' means an instrument which is capable of being put in suit" (*Goldsmid* v. *Hampton* (1858), 5 C. B. (N.S.) 94, at pp. 107, 108: *Cockburn*, C.J.).

"The case of *Stoessiger* v. *The South Eastern Rail. Co.* (1854), 3 E. & B. 549 seems to me to be precisely in point, without going into any of the other cases. Nothing is clearer to my mind than that, in the ordinary case of an acceptance with the drawer's name in blank, it is important, in order to constitute a

contract, that it should be known who is to be the drawer" (*M'Call* v. *Taylor* (1865), 19 C. B. (N.S.) 301, at p. 309 : *Erle*, C.J.).

"*Paintings, Engravings, Pictures.*"

"The only remark to be made upon the language of the statute, as affecting the meaning to be given to the word 'paintings,' is that the other matters mentioned in connection with it, 'engravings, pictures,' shew that the statute cannot be construed as meaning every thing which has painting done upon it by a workman, it must mean something of value as a painting (value being necessary to make the statute applicable), and something on which skill has been bestowed in producing it" (*Woodward* v. *London and North Western Rail. Co.* (1878), 3 Ex. D. 121, at p. 124: *Cleasby*, B.).

"I look to the collocation of the words of the statute, 'paintings, engravings, pictures,' which to my mind indicates the intention of the legislature that the word should receive its popular signification only. Then I look to the consequences of a wider interpretation, extending the meaning of the word to its literal significance. Looked at thus, it would include everything which was painted. So interpreted, it would include a plainly painted door or panel, etc., etc. It would be absurd to suppose that such was the meaning or intention of the legislature. It is a matter of common knowledge that many beautiful and artistic designs for hangings, paper for walls, muslins, china, etc., representing animals, flowers, landscapes, etc., are so exquisitely drawn and painted that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a jury, subject of course to the control which the Court exercises over verdicts if they are manifestly wrong" (*ibid.*, at pp. 125, 126 : *Hawkins*, J.).

In the above case a number of carpet and rug patterns and carpet designs, designed and painted by hand by skilled persons, and varying in value up to 6*l.* or more each according to the character of the design, and the amount of time and skill expended in producing it, were held not to be paintings.

"*Silks and Furs.*"

"The statute speaks of *silks* in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials ; but it mentions *furs*, without any such provision" (*Mayhew* v. *Nelson* (1833), 6 C. & P. 58, at pp. 59, 60 : *Tindal*, C.J.).

"*Lace.*"

The term "lace" shall with respect to any parcel or package delivered after the 30th day of September 1865, be construed as not including machine-made lace. See 28 & 29 Vict. c. 94 (The Carriers Act Amendment Act, 1865).

The Carriers Act, 1830, 11 *Geo.* 4 *&* *Will.* 4, *c.* 68, *applies to Articles though put out short of or carried beyond their Destination.*

"The question to be determined by us is whether, if goods, such as pictures, within the protection of the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68), are handed to a carrier, and then by the negligence of the carrier are carried beyond the point of destination and injured, this is an injury within the meaning of the Act. I think it is. If not, the Carriers Act would really be no protection at all: for in the majority of cases of loss or injury to goods, the fact is that the goods have not arrived at the station for which they were destined, but have been put out short of it or carried beyond it, and if the carrier is liable in such cases, the protection of the Act would be reduced to nothing" (*Morritt* v. *North Eastern Rail. Co.* (1876), 1 Q. B. D. 302, at p. 311: *Mellish*, L.J.).

The meaning of the word "Loss" under the Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68).

1. "Although the use of the term 'loss' in the preamble [*qu.* in the *title* of the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68)] does not aid in the construction of the enactment, the recital of its cause does,—it recites that valuable property, consisting of articles of great value in small compass, was liable to depredations,—and the reason of the law must be considered as being to protect the carrier, not in *all* cases where the owner of the articles sustained a damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel was either abstracted altogether or taken from the place where it ought to be, and incapable of being delivered at the time it ought to be by reason of that sort of loss. We think that this is the true construction of the clause, and the carrier is exempted only from being responsible for a loss *by him* of the particular articles named" (*Hearn* v. *London and South Western Rail. Co.* (1855), 10 Ex. 793, at pp. 801, 802: *Parke*, B.).

The Act protects Carriers from Liability as well for the Temporary as for the Permanent Loss of Undeclared Articles, and also from Liability for the Consequences of such Loss.

2. "The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers Act [11 Geo. 4 & 1 Will. 4, c. 68] protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable. So in the case of a temporary loss by the carrier; to hold him not liable for the loss but liable for the consequences of it is practically inconsistent, and so to construe the Carriers Act would in effect be to render it inoperative. It is to be observed that the Carriers Act protects the carrier from 'liability for the loss of or injury to' undeclared goods; the Act does not simply relieve him from paying the value of undeclared goods which he loses; he is relieved from liability for their loss, and it would be to fritter away the Act and to depart from sound principles of construction to hold that 'loss' in the Act only means 'value' as distinguished from 'loss' and its consequences.

"If we turn to authority we shall find that this view of the Act is supported by two decisions, one in this country and one in Ireland, viz., *Pianciani* v. *London and South Western Rail. Co.* (1856), 18 C. B. 226, and *Wallace* v. *Dublin and Belfast Rail. Co.* (1874), Ir. R. 8 C. L. 341. Both of these cases were decided on demurrer. The first shows that where goods are lost and the owner cannot recover the loss he cannot recover for non-delivery which is occasioned by the loss, and further, that where goods are detained but not lost the carrier is not protected. The case of *Wallace* v. *Dublin and Belfast Rail. Co.* (1874), Ir. R. 8 C. L. 341, appears to have been very like the case now before us, for the goods were there alleged to have been lost by the carriers, although only for a time and the Court held that the Carriers Act applied and protected carriers from liability as well for the temporary as for the permanent loss of undeclared articles, and also from liability for the consequences of such loss. This appears to us to be the proper construction of the statute.

The result comes to this; if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers Act, must depend upon whether

they have been lost by the carrier as distinguished from lost to the owner: see *Hearn* v. *South Western Rail. Co.* (1855), 10 Ex. 793; and this again must depend on the facts of each particular case. If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them he will not be liable; but if he keeps them after he has recovered them, the Carriers Act will not protect him from such subsequent breach of duty. The obligation on the part of the carrier to deliver the goods will remain or revive and he will be responsible for future breaches of that obligation. It is therefore a mistake to suppose that it will be against the carrier's interest to try and find undeclared goods temporarily lost. The utmost that can be said on that subject is that he will gain nothing by finding them. On the other hand, to hold him liable for their detention when temporarily lost, but not when permanently lost, would be to make it beneficial to him not to find them. If that were the law it would be to his interest to convert all temporary losses into permanent losses. This anomaly would, no doubt, be obviated by holding the carrier also liable for the detention of goods permanently lost, but in our opinion this cannot be done" (*Millen* v. *Brasch* (1882), 10 Q. B. D. 142, at pp. 146, 147: *Lindley*, L.J.).

Notice of Increased Rate of Charge.

Section 2.—When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds [10*l.*], it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

The person delivering the goods to the carrier must, in the first instance, declare their value, in order to fix the carrier with responsibility; and the carrier may then require an increased rate of charge according to a tariff put up in the office.

"The meaning of the legislature is, that all persons sending goods of a particular description and value, whenever they deliver them to the carrier, are bound to give information of the nature and value of the articles. That is the first clause; and the object of the legislature was, that such information should be given, whether the goods were delivered at the office of the carrier, or at the sender's house, or on the road or elsewhere; and clauses follow with certain provisions as to what is *then* to be done. Although the value and nature of the articles may be declared, it does not necessarily follow that the carrier would be protected, but a different clause must be acted on before his liability ceases. However, the first step to be taken is, that the sender of the goods notify their value; then it is that the carrier is entitled to have a larger charge. He cannot have that larger charge, or save himself from responsibility, by saying, 'I will have such and such a sum of money,' but he must have a tariff stuck up in his office, to notify to all persons sending articles of that kind what he proposes to demand beyond the usual charge. The notice required by section 2 to be affixed in the office, is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value—for the statute requires that in the first instance—but it is only a notice of what the extra charge is to be. This construction reconciles all the provisions of the Act. . . . . We think that the Act requires the person who sends the goods to take the first step, by giving that information which he alone can give; then the carrier may charge an additional price, but he can only charge the price notified in his office, and he is bound, if required, to give a receipt when the money is paid. All that follows the first step which is to be taken by the sender of the goods, and the carrier is not liable unless the declaration be made; and it must be made in all cases whether the goods are delivered at the office or elsewhere. Such declaration, when made, will lead to these consequences, that if the extra charge be paid and the goods lost, the carrier will be liable; or on the other hand, if he refuses to give a receipt, he will lose the benefit of the statute. But in no case can the sender recover, unless he has taken the step which the legislature intended he should take in the first instance" (*Hart* v. *Baxendale* (1851), 6 Ex. 769, at pp. 789, 790: *Patteson*, J.).

If the carrier accept the goods for carriage, without payment of the increased rate, and the value is declared, he will not be protected by the Act.

"The case of *Hart* v. *Baxendale* (1851), 6 Ex. 769, decides that

in such a case as the present, the person delivering the goods to the carrier must, in the first instance, declare their value, in order to fix the carrier with responsibility, and the carrier may then require him to pay an increased rate of charge according to a tariff put up in the office; but there is nothing in the statute [Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68)] which protects him from liability, if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried without making any demand of such increased rate, or requiring it to be either paid or promised. The carrier is not bound to accept such goods for carriage without payment of such increased rate, if required; but if he choose to do so, and the value is declared, he will not be protected by the Act" (*Great Northern Rail. Co.* v. *Behrens* (1862), 7 H. & N. 950, at pp. 953, 954: *Wightman*, J., delivering the judgment of the Exchequer Chamber (*Wightman*, *Williams*, *Willes*, *Byles*, *Keating* and *Blackburn*, JJ.)).

Carriers are to be paid in proportion to their increased responsibility.

"In order to protect carriers against loss by carrying at a low price, articles of great value in a small compass, from which they suffered for a series of years, the legislature has interfered and said that if they incur increased responsibility they ought to be paid in proportion, in the same way as persons who insure" (*Brunt* v. *Midland Rail. Co.* (1864), 2 H. & C. 889, at p. 893: *Pollock*, C.B.).

Meaning of "Value" in the Statute.

"I confess I entertain no doubt on this matter. 'Value' means the value to the consignor of the goods; the value of the goods to the consignor is that which his consignee has contracted to pay" (*Blankensee* v. *London and North Western Rail. Co.* (1881), 45 L. T. 761, at p. 762: *Coleridge*, C.J.).

At common law a carrier cannot succeed on the ground that the value of the goods was not declared in the absence of positive misrepresentation or other actual fraud.

"A third point was raised that the plaintiff is precluded from succeeding because she delivered valuables without declaring them, having notice that the company would not receive them unless declared and insured, and it was argued that this was a fraud, or that in some way the plaintiff was estopped. In the early part of the century this point was raised in many cases, and the decisions were conflicting; but since the case of *Walker* v. *Jackson* (1842),

10 M. & W. 161 it seems to have been regarded as settled law that a carrier cannot succeed on this ground in the absence of positive misrepresentation or other actual fraud, and the older decisions have dropped out of the books" (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at p. 380: *Wright*, J., reading the judgment of the court (*Lawrance* and *Wright*, JJ.)).

See also *ante*, pp. 382—387.

Carrier to sign a Receipt for Package or Parcel if required so to do.

Section 3.—Provided always, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Public Notice or Declaration no longer affects the Liability of a Common Carrier by Land.

Section 4.—Provided always, that from and after the 1st day of September now next ensuing [1830] no *public notice or declaration* heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said 1st day of September be liable, as at the common law, to answer for the loss of [*qu.* "or" omitted] any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

N.B.—As it is more convenient to consider sections 4 and 6 together, the latter section will be next given, and section 5 and its consideration will then be taken. See *post*, p. 432.

Special Contract Unaffected by the Act.

Section 6.—Provided always, that nothing in this Act contained shall extend or be construed to annul or in anywise affect any *special contract* between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandise.

Section 4 is to be construed as a general enactment and is not confined to articles or goods specified in Section 1 (*ante*, p. 415). See *Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at p. 383: *per Wright*, J., reading the judgment of the court (*Lawrance* and *Wright*, JJ.).

Public Notices are no longer of any Avail in Limiting the Liability of a Carrier; but Special Contracts Limiting such Liability may still be made.

1. "The notices mentioned in the 4th section are '*public*' notices: that is, I think, such notices as are mentioned in the preamble, viz., notices published by the carrier [with the intent to limit their responsibility]; whereas section 6 refers to contracts made by the parties when they came together" (*Great Northern Rail. Co.* v. *Morville* (1852), 7 Rail. Cas. 830, at p. 834: *Coleridge*, J.).

"The notices referred to in the 4th section of the Carriers Act are general notices to the public. It was provided by that section, that 'public' notices should no longer be of any avail, in order to obviate the question which was perpetually occurring, whether such public notices had been brought home to the party sending the goods. That section has no connection with the 6th section, which leaves it open to a carrier to make what special contract he pleases with individuals" (*ibid.*, at p. 835: *Erle*, J.).

2. "It is perfectly clear that, since the passing of the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68), it is competent for a carrier to make a special contract to convey goods and chattels; and it is clear that the liability of the latter may be made to depend upon the terms of that contract into which both parties have entered. Here the parties have entered into a special contract, and consequently the only question is as to the meaning of that contract. According to the old cases, the construction of carriers' notices had this limitation put upon them, that, according to the ordinary terms of the notice, he would be responsible for gross negligence, unless he excluded his liability in express terms. The practice of a carrier protecting himself by a mere notice, was put an end to by

the Carriers Act" (*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, at p. 711 : *Parke*, B.).

The Special Contract is not required to be in Writing or Signed, nor to have any Formal Requisite whatever.

3. "It seems to be contended by Mr. Cowling that, since stat. 11 Geo. 4 & 1 Will. 4, c. 68 [The Carriers Act, 1830] it is not lawful to make a special contract limiting the liability of a carrier ; but I am clearly of opinion that the legislature had no such intention, and that such is not the operation of the Act. Sect. 4 in effect says that a carrier shall not limit his liability merely by a public notice, but leaves it open to him to limit his liability by a special contract" (*Walker* v. *York and North Midland Rail. Co.* (1853), 2 El. & Bl. 750, at p. 759 : Lord *Campbell*, C.J.).

"It is well known that before that Act [11 Geo. 4 & 1 Will. 4, c. 68], the common law liability of carriers pressed heavily upon them in respect to articles of great value, for which they received a small remuneration. The legislature therefore interfered, and as to those articles, provided a mode by which the carriers might secure themselves from such liability ; and at the same time it took away the imperfect and vexatious mode, which had been adopted by carriers, of limiting their liability by public notices, a mode which, as every lawyer knows, led to much and vexatious litigation. Therefore the legislature, by sect. 4, says they shall not limit their liability by any 'public notice or declaration.' But, by sect. 6, it goes on to say that nothing shall affect any special contract. The legislature says nothing as to the mode in which such a special contract shall be made ; it is not required to be in writing or signed ; nor is there any other formal requisite, so that in every case it must be a question of fact whether there was such a contract" (*ibid.*, at p. 762 : *Coleridge*, J.).

A Public Condition or Public Declaration, to be Effectual at all, must now be Incorporated in a Special Contract.

4. "It certainly seems to me that, whatever might have been the case before this enactment [the Carriers Act, 1830], it is clearly enacted that no condition shall in future operate merely as being a public condition or public declaration, and that, to be effectual at all, it must be incorporated in a special contract" (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at p. 497 : *Blackburn*, J.).

Special Contract may be made as at Common Law; Evasion by Railway Companies of Salutary Policy of the Common Law.

5. "We find that by the express enactment of the legislature in 11 Geo. I & 1 Will. 4, c. 68 [The Carriers Act, 1830], no public notice or declaration could as such in any way affect the liability of a carrier as regarded goods in general, *though special contract, might be made as at common law*; and it had been decided that such notices or declarations, when brought home to the customer, did operate as being the basis of a special contract to carry on the conditions contained in such notices. It had also been decided that such conditions, when thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had further been decided that a special contract ought to be inferred from the act of a party sending goods after the receipt of a notice, even where the party protested against the notice. And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage of goods, and, it was alleged, abused their advantages so as (in the language of Story, already cited) 'to evade altogether the salutary policy of the common law.' It was under these circumstances that the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), was passed" (*ibid.*, at p. 507).

For the Railway and Canal Traffic Act, 1854, see Section VIII., *post*, p. 439.

What are deemed Receiving Houses, Warehouses, or Offices of Common Carriers.

Section 5.—For the purposes of this Act every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and any one or more of such mail contractors, stage coach proprietors, or common carrier shall be liable to be sued by his, her, or their name or names only; and no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

As to the latter part of this section, see Rules of the Supreme Court, Order 21, Rule 20, and Order 16, Rule 11.

Innkeeper employed by more Carriers than one.

1. "The plaintiff in this case, wanting to transmit a parcel to London, sends it to Johnson, the postmaster of Bradford, who receives twopence on account of it, and delivers it to a person by whom it is carried to the inn at Melksham. What is the inference from these facts? That there was a contract between the plaintiff and Johnson, not for sending the parcel to London, but for sending it to Melksham to be forwarded. When that was done, Johnson had performed his duty and earned his reward. Then as to the house at Melksham. It seems that for two years and a half the mail had stopped there to receive parcels. In all common understanding that made it a receiving house for the mail. We must take it that the coach stopped there by direction of the proprietors. It is said that the inn was not a receiving house for them, because other coaches stopped there, and the innkeeper had his option of sending the parcel by any, and that, not receiving for one in particular, he could not be the agent of that one. But, construing the facts as reasonable men, we must say that, as soon as the innkeeper determined upon the coach by which he would send, he became, for that purpose, the agent of the proprietors" (*Syms* v. *Chaplin* (1836), 5 A. & E. 634, at pp. 643, 644: *Coleridge*, J.).

2. "The difficulty which was suggested, that there might be two railways by either of which the goods might be sent, is met by the judgment in *Syms* v. *Chaplin* (1836), 5 A. & E. 534. It may be that if goods are delivered under such conditions to a person who was employed by both companies without any intimation by which railway they are to go, they are not received for either of them until he makes up his mind and destines them to go by one of the railways, but from that time the goods would be received and held by him for that railway" (*Stephens* v. *London and South Western Rail. Co.* (1886), 18 Q. B. D. 121, at p. 124: Lord *Esher*, M.R.).

See also *ante*, p. 366, Booking Offices, and p. 367, Carriers' Agents.

Customer recovering back increased Charge in addition to the Value of Parcel or Package.

Section 7. Provided also, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Carriers' Liability for Felonious Acts of Servants, and the latters' Liability for their own Personal Neglect or Misconduct. (36)

Section 8. Provided also, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

The first part of this section deals with the non-protection of common carriers, and the second with the non-protection of their servants.

Section 8 is confined to the case of valuables specified in the Act, and is not a general enactment.

"It may be added that s. 8 of the Act of 1830 [the Carriers Act, 1830], cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act, and are in strong contrast with the language used in s. 4, which was intended to be general. This view was plainly the view of the Court in *Batt* v. *Great Western Rail. Co.* (1851), 11 C. B. 140, and it must always have been the view of pleaders, because all the precedents of replications of felony by the carrier's servants are to pleas of the Carriers Act, and not to pleas of contracts at common law" (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at p. 383: *Wright*, J., reading the judgment of the Court (*Lawrance* and *Wright*, JJ.)).

Under the Carriers Act, 1830, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it, and on the other hand, under the carrier's notice, negligence is the sole question, felony is immaterial.

"I am of opinion that the judge of the county court erred in two respects. He tells them, that, to entitle the plaintiff to a verdict, they must be satisfied of both of two facts,—that a felony had been committed with the parcel in question by some one of the company's servants,—and that such felony was caused or facilitated by the negligence of the company or their servants: and that, if they were satisfied that the parcel had been stolen by some one of the company's servants, but were not of opinion that such felony

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Canadian Cases.

(36) *Hall* v. *McFadden*, 21 N. B. Reps. 586, *post*, and s. 241 Railway Act, Canada, 1888.

was occasioned or facilitated by the negligence of the company, or, if they were of opinion that the parcel had been lost by the negligence of the company, but were not satisfied that a felony had been committed by some one of the company's servants, —in either case the defendants were entitled to their verdict. I think the judge was wrong in leaving the first question to the jury, because there was in my opinion no evidence whatever for them that any felony had been committed by any one of the company's servants. In truth, unless the courts in cases of this sort take upon themselves the duty of deciding, the statute which was intended for the protection of the carrier, will become a dead letter: for, juries always will find felony as against a company. I think it is the duty of the presiding judge to withdraw the question altogether from the jury, and not to allow them an opportunity of finding in favour of the plaintiff in defiance of all evidence. I therefore think the judge of the county court in this case was wrong in leaving it to the jury at all, and that he ought at once to have directed a nonsuit. Further, I think the judge has altogether misconceived the decision of this court in the case of *Butt* v. *The Great Western Rail. Co.* (1851), 11 C. B. 140, because, when the defendants set up a defence under the statute, negligence has nothing to do with the question. The rule is this,—under the statute, felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and, on the other hand, under the carrier's notice, negligence is the sole question, felony is immaterial. Under the statute, felony is an answer; under the notice, negligence. That is the effect of *Butt* v. *The Great Western Rail. Co.* (1851), 11 C. B. 140, which was a case of felony permitted or occasioned by the negligence of the defendants" (*Great Western Rail. Co.* v. *Rimell* (1856), 18 C. B. 575, at pp. 584, 585, 586: *Jervis*, C.J.).

All Parties actually Employed, whether directly or by sub-contract, in doing the Work the Carrier undertakes to do, either by himself or his Servants are his Servants.

"In order, however, to guard the public against the consequences of effecting such insurance—for one consideration for the insurance is the disclosure to the carrier's servants by such notice of the value of the goods to be transmitted—the legislature, whilst it says that the carrier shall not be liable unless the article sent be insured, goes on to provide that, whether it be insured or not, the carrier shall still be liable 'to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ.' And I am of opinion that this liability cannot be

disposed of by the introduction of the term 'agent,' or by giving a principal name to the employment of any one employed to discharge the duty undertaken by the carrier. In the case which was put in the course of the argument where a carrier confines himself to receiving goods and making contracts for their carriage, and avails himself of a sub-contract to transfer to some one else the whole duty which he has undertaken to perform, I think that *all* the parties who come in under that subsequent contract, whether directly or by the sub-contract,—I think that *all* the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of the eighth section of the Act in question" (*Machu* v. *London and South Western Rail. Co.* (1848), 2 Ex. 415, at pp. 426, 427 : *Pollock*, C.B.).

"I think that a very large construction ought to be given to these words [*supra*] ; they must be taken to mean book-keepers, porters, or other servants actually employed to do what the carrier has undertaken to do. The legislature not only contemplated that a carrier might himself carry the goods delivered to him, but that he might hand them over to another person to carry. If they were stolen by himself, he of course would not be protected ; neither do I think he would if the person whom he had employed as a substitute were to steal them. Unless that construction be adopted, this anomaly would follow. Nothing was more common, under the old system, than for the coachman to hire the guard, or the guard the coachman ; and if a person had lost anything sent by a stage-coach, and had sued the proprietor, could the claimant be turned round by the proprietor saying, 'I did not employ the guard or coachman?' I think, therefore, that when the legislature used the word 'servant' in this section [8], they meant to say, the carrier being clearly liable if he steals the goods himself, and it being his ordinary duty as carrier to carry them himself, he shall equally be responsible if any other person employed under the contract steals them" (*ibid.*, at p. 430 : *Rolfe*, B.).

"Any person employed by a carrier to perform the contract into which he enters, is a servant in the employ of the carrier, within the true meaning of this statute. Any other construction would be the parent of very dangerous consequences. These companies might let out every single part of their carriers' business, which is generally very extensive, to others, who might employ other servants under them. If we were to hold that such persons are not the servants of the company, a complete immunity would be obtained from the responsibility for every single theft that might be committed from one end of their line to the other, under the pretext that the persons by whom the theft had been committed

were not their servants or in their employ. It would be an exceedingly dangerous doctrine to hold, that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a sub-contract unknown to the other party, get rid of their responsibility" (*ibid.*, at p. 433 : *Platt*, B.).

As to who are carriers' servants, see *ante*, p. 367, Carriers' Agents ; and *post*, p. 517, Section XIII.—Carriers' Servants.

"Baron *Rolfe's* judgment [in *Machu* v. *London and South Western Rail. Co.* (1848), 2 Ex. 415, at p. 430] is extremely instructive, and shows the kind of mischief which was sought to be guarded against by this section [8] of the Carriers Act" (*Stephens* v. *London and South Western Rail. Co.* (1886), 18 Q. B. D. 121, at p. 125 : *Lindley*, L.J.).

Proof that the taking was by some one who was more or less a Servant is sufficient.

"I quite agree with the doctrine involved in the decision of the court in *Vaughton* v. *London and North Western Rail. Co.* (1874), L. R. 9 Ex. 93 to this extent : that it is not necessary to shew, in order to make out a replication of a felonious act on the part of the carriers' servants, that the taking was by any particular servant or servants. It is enough, if there is proof to satisfy the jury that the taking was by some one who was more or less one of the company's servants, without specifying the particular servant" (*M'Queen* v. *Great Western Rail. Co.* (1875), L. R. 10 Q. B. 569, at p. 573 : *Cockburn*, C.J.).

Where Goods are delivered to a Receiving-office pointed out by the Carrier, it is just the same as if they were delivered to him.

"It seems to me that the 5th section of that Act [The Carriers Act, 1830] was passed in order to meet the case where persons employed in receiving goods for the company are not strictly speaking the servants of the company ; but for a particular purpose, and for that only, the legislature desired to bring them into that category. The Act says that for certain goods the carrier shall not be liable, unless the person who delivers them declares their value. That is in relief of the carrier, but then it is pointed out that he ought to be answerable for the honesty of the people he employs, and so in the case of dishonesty on their part, the liability of the carrier as a common carrier is to be restored. In the 8th section a number of persons are named, book-keepers and others, and lastly 'servants.' Now by the 5th section, every office, warehouse, or receiving-house used or appointed by a common carrier, was to be deemed and taken to be the receiving-house, warehouse, or office of such carrier, so when a railway company

give notice to the public that a certain place is a receiving-office, that receiving-office must be considered as if it were part of the railway system. In other words, where goods are delivered to a receiving-office pointed out by the railway company, it is just the same as if they were delivered to the company" (*Stephens* v. *London and South Western Rail. Co.* (1886), 18 Q. B. D. 121, at pp. 123, 124 : Lord *Esher*, M.R.). (37)

Carrier may require Proof of the Actual Value of any Parcel or Package by the Customer.

Section 9.—Provided also, that such mail contractors, stage coach proprietors, or other common carriers for hire shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

Payment of Money into Court by Defendant.

Section 10.—In all actions to be brought against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action.

See also, Rules of the Supreme Court, Order XXII.

Canals and Navigation Companies.

Before passing to the next section it may be as well to call attention to the Canal Carriers Act, 1845 (8 & 9 Vict. c. 42), which enables canal and navigation companies incorporated or established under the authority of Parliament to carry as common carriers all such goods, wares, merchandise, articles, matters and things as may be entrusted to them for that purpose.

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(37) See *Milloy* v. *Grand Trunk Rail. Co.*, 23 O. R. 457 : *Galt*, C.J. ; *Morrison* v. *Thompson*, 2 Russ. & Ches. (N.S.) 411 ; *Hamilton* v. *Anglo-French Steamship Co.*, 2 Russ. & Ches. (N.S.) 352 : *Smith*, J.

SECTION VIII.

Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31).

(*a*) *Reason for the Act being passed*, p. 440.
(*b*) *Sections* 1 *and* 2, p. 443.
(*c*) *Sea Transit*, p. 446.
(*d*) *Railway Stations*, p. 446.
(*e*) *Reasonable Facilities*, p. 447.
(*f*) *Undue Preference*, p. 451.
(*g*) *Right of Action for Extortion*, p. 454.
(*h*) *Parcels and Enclosures*, p. 456.
(*i*) *Section* 7 *of the Railway and Canal Traffic Act*, 1854.—*Liability for Neglect or Default notwithstanding notice*, p. 458.
(*k*) *History of the Law of Limitation, and occasion for section* 7, p. 459.
(*l*) "*Neglect or Default of the Company*," p. 462.
(*m*) *General Scope of the Act*, p. 463.
(*n*) *General Notice Invalid—Signed Special Contract*, p. 466.
(*o*) *The Real Question*, p. 468.
(*p*) *Just and Reasonable Contract a Question for Court—Condition Exempting wholly from Liability is primâ facie Unjust—Alternative Offer*, p. 469.

The Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119).

Limitation of Liability during Sea Transit, p. 474.

The Regulation of Railways Act, 1871 (34 & 35 *Vict. c.* 78).

Limitation of Liability during Sea Transit in Vessels not belonging to the Railway Company, p. 474.

Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60).

(*a*) *Liability of Shipowners with regard to Fire*, p. 475.
(*b*) *Non-Liability of Shipowners with regard to Undeclared Gold, Jewellery, etc.*, p. 476.
(*c*) *Limitation of Shipowners' Liability with regard to Loss of Life or Personal Injury, and Damage or Loss to Goods, Merchandise, etc.*, p. 477.
(*d*) *Non-liability of Shipowners in Cases of Compulsory Pilotage*, p. 479.

We have seen, *ante*, p. 412, that the cases decided between 1832 and 1854, established that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases of gross negligence, misconduct, or fraud on the part of himself or his servants; and the reason why the legislature intervened by the statute that will be now noticed, viz., the Railway and Canal Traffic Act, 1854, was because it thought that the railway and canal companies took advantage of those decisions to evade altogether the salutary policy of the common law. (38) In this section we shall deal with the Railway and Canal Traffic Act, 1854,

the Railway Regulation Acts, 1868 and 1871, and the Merchant Shipping Act, 1894, so far as they limit the common law liability of carriers, and concern the subject of bailments.

THE RAILWAY AND CANAL TRAFFIC ACT, 1854. (17 & 18 VICT. c. 31.) (39)

(a) Reason for the Act being Passed.

1. "It was about the time of the decision of *Hinton* v. *Dibbin* (1842), 2 Q. B. 646 that railways came into general use, and began to supersede all other modes of conveyance. The companies became in the habit of imposing conditions on their customers intended to restrict, and in some cases entirely to remove their liability to an extent many persons thought unreasonable. The validity of such restrictions was questioned in various actions, and the series of decisions arose which resulted in settling the law in such a manner as to cause the legislature to intervene by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31)" (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at p. 500: *Blackburn*, J.).

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(38) "The law applicable to this case is the same as governed the English courts before the passing of the Railway and Canal Traffic Act, 1854. There is an overwhelming body of authority to show that the carrier may, by conditions aptly framed, protect himself against the consequences of negligence": *per Moss*, C.J.A. (*Fitzgerald* v. *Grand Trunk Rail. Co.*, Tupper's Reports in Appeal, vol. iv., 601).

(39) *The Railway Acts Statutes of Canada*, 1888—*Reason for the Act being passed.*—By means of special contracts railway companies were acquiring an entire immunity from liability, and the courts began to point out the necessity and justice of legislative redress. See judgment of *Morrison*, J., in *Hamilton* v. *Grand Trunk Rail. Co.*, and *Draper*, C.J., in *Bates* v. *Great Western Rail. Co.*, *ante*, p. 398.

The Dominion Act (34 Vict. c. 43), s. 5, was, therefore, passed with the obvious intention of restricting the power of railway companies contracting themselves free from liability for loss however caused. This Act, however, the Ontario courts in *Scott* v. *G. W. Rail. Co.*, 23 U. C. C. P. 182, and *Allan* v. *G. W. Rail. Co.*, 33 U. C. R. 483, decided did not apply to railways incorporated before 1868; and the Supreme Court of Nova Scotia, in 1871, in *Dodson* v. *Grand Trunk Rail. Co.*, 7 U. C. L. J. (N.S.) 263, said that it might be advisable for Parliament to pass a law for the whole Dominion founded on the Imperial Act, 1854. Similar sentiments having been expressed by the Ontario courts Parliament in 1875 passed 38 Vict. c. 24, with the apparent design of restricting all railway companies. This Act was repealed, and practically re-enacted by the Consolidated Railway Act, 1879. The Railway Act, 1888 with its amending Acts, has repealed the Act of 1879, but it is substantially the same. Under the Railway Act of 1888 it has been held that railways subject to the statute are unable to set up a special contract limiting their

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liability, where the loss has been occasioned by the negligence of the company or its servants (*Vogel* v. *Grand Trunk Rail. Co.*, 11 S. C. R. 612).

"The defendants are subject to the statutory law which takes away the defence in an action of this kind, where the loss has been occasioned by the negligence of the company or its servants": *per Ritchie*, C.J. (*Vogel* v. *Grand Trunk Rail. Co.*, 11 S. C. R. 612). The facts in this case were as follows: The plaintiff shipped live stock on the defendants' railway, subject to the conditions on a shipping bill, one of which was that live stock was taken entirely at the owner's risk of loss, injury, or damage, whether in loading or unloading conveyances or otherwise, and that all live stock should be carried by special contract only. The animals were killed or lost by the defendants' negligence:—*Held*, that the defendants could not escape liability by their conditions, for their liability was expressly provided for by 42 Vict. c. 9, s. 25 (4) (now s. 246 (3) of the Railway Act, 1888). "When a contract stipulates that the company shall not be liable for any damage that may occur to goods arising from certain causes no doubt this would exempt them from damage arising from those causes, the result of mere accident when no blame is imputable to them, but not from responsibility for their own negligence and want of care. Under such a contract the onus would be upon the owners of the goods to show that the damage was attributable to the misconduct of the company or their servants, but if that is established the contract affords no answer": *per Burton*, J.A., *ibid.* "In this country [Ontario] before the passing of the Act of 1871, just as in England before the passing of the Carriers Act, there was nothing to prevent carriers from contracting to limit their liability in any way or to any extent they thought proper. The object of the notice, condition, or declaration, both here and in England, was to impose terms upon the sender in restraint of the carrier's liability" (*per Osler*, J.A.: *Vogel* v. *Grand Trunk Rail. Co.*, 10 O. A. R. 186; 11 S. C. R. 612).

The Railway Act, 1888 (D.) (51 Vict. c. 29), s. 246 (3), declares that the party aggrieved by any neglect or refusal shall have an action therefor against the company, from which action the company shall not be relieved by any notice condition, or declaration if the damage has arisen from any negligence or omission of the company or of its servants.

Held per Ritchie, C.J., and *Fournier* and *Henry*, JJ., that under the general Railway Act, 1868 (31 Vict. c. 68), s. 20 (4), as amended by 34 Vict. c. 43, s. 5, re-enacted by Consol Railway Act, 1879 (now the Railway Act, 1888), which prohibited railway companies from protecting themselves against liabilities for negligence by notice, condition or declaration, and which applies to the Grand Trunk Railway Company, the company could not avail themselves of a notice that the owner undertakes all risks of loss, injury, damage, etc., and that the company were responsible for the negligence of themselves or their servants (*Grand Trunk Rail. Co.* v. *Vogel*, 11 S. C. R. 612).

A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the allowance of a reduced rate of freight not to hold the company liable (*Cobban* v. *Canadian Pacific Rail. Co.*, 26 O. R. 732; 23 A. R. 115). *Per Osler*, J.A.: "The offer and acceptance of an alternative or reduced rate does not permit the railway company to contract itself out of liability for negligence. . . . I have ventured to hold this opinion, relying upon the difference between the language of our Railway Act and of s. 7 of the Imperial Railway and Canal

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Traffic Act, 1854, the latter enabling a company to make a special contract, with just and reasonable conditions, while ours contains an absolute denial of power to escape from liability for negligence."

"Comparing the Canadian Railway Act (51 Vict. c. 29), s. 246 (D.), with its English analogue, s. 7 of the Railway and Canal Traffic Act, 1854, c. 31, I think the plain and reasonable meaning of the clause in question is that in case of negligence in the carriage of goods no notice, condition, or declaration —whether manifested by general and public advertisement, or by any particular provisions in a special contract signed by the shipper—shall relieve the railway company from being sued for damage arising from such negligence" (*Robertson* v. *Grand Trunk Rail. Co.*, 21 O. A. R. 216; 24 S. C. R. 611: *per Boyd*, C.). "The object of our Act as of the English Act, was to prevent the oppression of the shipper by the carrier, but with us the legislature has not thought fit to enable the parties by special contract on reasonable conditions to waive the protection of the Act." "The word 'neglect' in the statute includes neglect in carrying as well as neglect or default in omitting to carry": *per Osler*, J.A., *ibid.*

The case of *Robertson* v. *Grand Trunk Rail. Co.* decided that s. 246 (3) of the Railway Act, 1888, does not disable a railway company from entering into a special contract for the carriage of goods, and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence.

"In *Vogel's Case* the question was, as to exemption from all liability, and nothing there decided established or tended to establish, that it was not competent to the respondents to enter into an agreement for pre-ascertained damages, or for limited liability, if that term is perferred": Sir *Henry Strong*, C.J., *ibid.*

"In *Vogel's Case* it was held to be clearly against the statute to contract for complete immunity from the consequences of negligence, but I am not prepared to hold that a fair and reasonable provision limiting the measure of damage to the declared and agreed-on value of the animal or article may not be lawfully entered into, the price of transport being proportioned to such fixed value": *per Hagarty*, C.J.O., *ibid.*, and see judgment of *Gwynne*, J., *post*, p. 465.

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line, it is entering into a contract which, under s. 104 of the Consolidated Railway Act [now s. 246, Railway Act, 1888], it has the power to refuse. It may, therefore, restrict its liability for negligence as carriers, or otherwise, in respect of the goods to be carried after they have left its own line" (*McMillan* v. *Grand Trunk Rail. Co.*, 16 S. C. R. 543).

"The duties and obligations referred to by s. 246 (3) were clearly prescribed in respect of a railway company's own line, and not with respect to the lines over which it might, if it chose, undertake to forward or carry" (*ibid.*, judgment of *Strong*, J., in Supreme Court). "*Vogel* v. *Grand Trunk Rail. Co.*, *Martin* v. *Grand Trunk Rail. Co.*, and *McMillan* v. *Grand Trunk Rail. Co.*, only go the length of shewing that railway companies cannot, by notice or express contract, relieve themselves from an action in respect of an injury to the person of a passenger, or loss or damage to goods resulting from direct negligence on the part of the company or their servants during the transport of such passenger or goods. They do not decide that for a benefit and consideration accruing directly to the passenger or shipper he may not stipulate that, in the event of

The Case that led to its Passing.

2. "*Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707; the case which led to the passing of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31)" (*Gallin* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 212, at p. 216; *Blackburn*, J.).

3. "When the Railway and Canal Traffic Act was passed the law in respect to the liability of carriers had been much relaxed, and the weight of decisions at that time established that carriers might by special notice make contracts limiting their responsibility even in cases of gross negligence, misconduct, or fraud on the part of their servants. The legislature thought that the companies took advantage of these decisions to evade the salutary policy of the common law, and accordingly intervened and passed the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31)" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at p. 190: *Lopes*, L.J., using the language of *Blackburn*, J. See *ante*, pp. 412, 432.

(b) Sections 1 and 2.

THE RAILWAY AND CANAL TRAFFIC ACT, 1854. (17 & 18 VICT. c. 31.) (40)

AN ACT for the better Regulation of the Traffic on Railways and Canals. [10th July 1854.]

Interpretation of terms.

Section 1.—In the construction of this Act, "the Board of Trade" shall mean the Lords of the Committee of her Majesty's

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such injury or damage arising through such negligence, his damages shall not exceed a certain amount, thus, as it were, fixing a maximum limit for the assessment of such damages" (*per Cameron*, C.J.: *Bate* v. *Canadian Pacific Rail. Co.*, 14 O. R. 637).

(40) AN ACT RESPECTING RAILWAYS.

(51 VICT. c. 29.)

Application of the Act (D).

Section 3. This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies, and railways within the legislative authority of the Parliament of Canada, except government railways.

The several provincial legislatures have substantially embodied this Act in their statute law so as to apply to railways subject to the legislative authority

Privy Council for Trade and Foreign Plantations; see also The Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 12 (8).

The word "traffic" *shall include* not only passengers, and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company:

The word "railway" *shall include* every station of or belonging to such railway used for the purposes of public traffic: and

The word "canal" *shall include* any navigation whereon tolls are levied by authority of Parliament, and also the wharves

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of the various provinces (R. S. O. 1897, Ch. 207; R. S. M. 1891, Ch. 130; R. S. B. C. 1897, Ch. 163). Statutes of Nova Scotia, 43 Vict. c. 20.

Interpretation of terms.—Section 2. In this Act, and in the special Act incorporating any railway company to which this Act or any part thereof applies, unless the context otherwise requires—

(*a.*) The expression "company" means a railway company, and includes any person having authority to construct or operate a railway;

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(*c.*) The expression "court" means a superior court of the province or district.

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(*f.*) The expression "goods" includes things of every kind that may be conveyed upon the railway, or upon steam vessels or other vessels connected with the railway;

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(*o.*) A railway shall be deemed to come "near" to another when some part of the one is within one mile of some part of the other.

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(*q.*) The expression "railway" means any railway which the company has authority to construct or operate, and includes all stations, depôts, wharves, property and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act.

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(*t.*) The expression "special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts.

(*u.*) The expression "toll" includes any rate or charge made for the conveyance of any passenger, goods, or carriage, or for the collection, loading, unloading, cording, or delivery of goods, or for warehousing or wharfage or other services incidental to the business of a carrier.

(*v.*) The expression "traffic" includes not only passengers and their baggage, goods, animals, and things conveyed by ralway, but also cars, trucks, and vehicles of any description adapted for running over any railway.

and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic:

The expression "railway company," "canal company," or "railway and canal company," *shall include* any person being the owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any Act of Parliament:

A station, terminus, or wharf *shall be deemed* to be near another station, terminus, or wharf when the distance between such stations, termini, or wharves shall not exceed one mile, such stations not being situate within five miles from St. Paul's Church in London.

As to the meaning of the expression "shall include" used above, see the cases of *Dyke* v. *Elliott* (1872), L. R. 4 P. C. 184; *R.* v. *Hermann* (1879), 4 Q. B. D. 284; *Corporation of Portsmouth* v. *Smith* (1883), 13 Q. B. D. 184, *ante*, p. 196, Chapter V.—Pledges, Section XIV., and *Dilworth* v. *Commissioners of Stamps*, [1899] A. C. 99, at pp. 105, 106: Lord *Watson*.

As to the meaning of the expression "shall be deemed" used above, see *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, *ante*, p. 187.

Reasonable Facilities to be afforded. (41)

Section 2.—Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all *reasonable facilities* for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to *or worked by* such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any *undue or unreasonable preference or advantage* to or in favour of any particular person or company,

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(41) By s. 240, it is provided that "Every company shall, according to its power, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivery of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles," and by amending Act (61 Vict. c. 22), "and likewise to every other carrier of passengers or goods by land or by water." It is also further provided by this section that no undue preference shall be given to any particular person or company, and that reasonable facilities shall be afforded for receiving and forwarding all traffic arriving by railways, either intersecting its own or which has a station, terminus, or wharf, near to any terminus, station, or wharf of such company. "I lay no stress upon s. 240, because differing from s. 2 of the Railway and Canal Traffic Act it only regulates one company's dealings with another and not with individual shippers of goods" (*Osler*, J.A.: *Robertson* v. *Grand Trunk Rail. Co.*, 21 O. A. R. 214).

or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue or unreasonable prejudice or disadvantage* in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all *due and reasonable facilities* for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

Section 2 above was explained and amended by s. 11 of the Railway and Canal Traffic Act, 1873 (36 & 37 Vict. c. 48), and this last-named section was in its turn repealed by s. 59 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). Section 2 is explained and amended, as to through traffic, by s. 25 of the Act of 1888; and by s. 28 of the same Act it is applied to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried in the same manner, and to the like extent as it applies to the land traffic of a railway company.

(c) Sea Transit. (42)

Except as above mentioned, the Railway Acts do not apply to Sea Transit.

"The Railway Acts do not apply to sea transit" (*Branley* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 63, at p. 74: *Willes*, J.). See *post*, p. 471.

(d) Railway Stations.

A station is the absolute property of a railway company, and the company has, in the first instance, the absolute right to regulate their own traffic in their own way.

Canadian Cases.

(42) The statute law of Canada respecting carriers by water is contained in R. S. C., 1888, c. 82, p. 1211, *post*.

See also *post*, Section XIV.—Passengers, (a) Contract with Carrier.

"I am of opinion that the station is absolutely the property of the railway company, and that the rights of the railway company are just as absolute in the first instance as those of any other proprietor. That by appeal to the appropriate tribunal they may be compelled to permit passengers and traffic under a variety of conditions under proper orders of court is true; but that against their will any member of the public has a right to force himself upon the platform or into the booking-office I cannot agree.

"The public has a right to go, and has a right to enter into a contract with them; and the railway company may be compelled if they refuse, either by action at the suit of the complaining party or by an application to the railway commissioners. But I should be sorry to throw any doubt on the absolute right of the railway company in the first instance to regulate their own traffic in their own way, and to refuse access to their station under the circumstances stated in this case. Of course, it would be represented as a ludicrous exercise of authority to prescribe the dress in which persons may approach their station; but I can quite understand the inconvenience which might result to the passengers, that is to say, to the public, if, apart from the annoyance of actual solicitation of custom for various hotels outside, the persons who rush in to solicit custom should do it by conspicuous badges describing the hotel to which they belong" (*Perth General Station Committee* v. *Ross*, [1897] A. C. 479, at p. 483: Lord *Halsbury*, L.C.).

(c) Reasonable Facilities.

What is meant by the Act Imposing on Railway Companies the Duty to afford Reasonable Facilities for Receiving, Forwarding, and Delivering all Passengers' Goods and Animals. (43)

"There are very few enactments which in plain and distinct terms impose upon companies the duty of carrying any particular things. They are bound to carry troops (7 & 8 Vict. c. 85, s. 12), and mails (36 & 37 Vict. c. 48, s. 18), but until the passing of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), the duty of railway companies to carry any particular class of goods

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Canadian Cases.

(43) Section 241.—Every officer, servant, or agent of any company having the superintendence of the traffic at any station or depôt thereof, who refuses or neglects to receive, convey, or deliver at any station or depôt of the company for which they are destined, any passenger, goods, or thing brought, conveyed or delivered to him, or such company for conveyance over or along its

depended upon whether they did or did not profess to carry such goods as common carriers. The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession. This was decided by *Johnson* v. *Midland Rail. Co.* (1849), 4 Ex. 367, and was recognised as clear and settled law by Vice-Chancellor *Wood* in *Hare* v. *London and North Western Rail. Co.* (1861), 2 J. & H. 80. The Railway and Canal Traffic Act, 1854, materially altered the law in this respect, for it enacts by s. 2 that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic; and by s. 1 the word 'traffic' includes passengers and their luggage, and goods, animals, and

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Canadian Cases.

railway from that of any other company intersecting or being near to such first-mentioned railway, or who in any way wilfully violates the provisions of s. 240, shall be liable to a penalty.

Section 246.—(1.) All regular trains shall be started and run as near as practicable at regular hours fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the trains.

(2.) Such passengers and goods shall be taken, transported to and from, and discharged at such places on the due payment of the toll, freight, or fare lawfully payable therefor.

"After a careful examination of all the statutes bearing upon this case, I agree with Mr. Justice Osler: 'That these defendants are subject to the statutory law which takes away the defence in an action of this kind where the loss has been occasioned by the negligence of the company or its servants.' The statutory obligation imposed upon a company is 'to start trains at regular hours, and to furnish sufficient accommodation for the transport of all passengers and goods, etc., and any party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration if the damage arises from any negligence or omission of the company or its servants.' Any neglect or refusal in the premises. What are the premises? To take transport and discharge *inter alia* such passengers and goods upon payment of the freight or fare legally authorized therefor; if the goods, then, are not transported and discharged by reason of any neglect or refusal, clearly an action lies, and is there any difference whether the neglect is in not providing sufficient accommodation, or in not sending the goods forward in the first instance, or having sent them forward, in not transporting them to, and discharging them at, the place of destination—but so negligently dealing with them that such transport and discharge was prevented. I think the object of the legislation was to prevent railway companies from escaping liability by entering into contracts whereby they could free themselves from liability for the neglect of themselves or their servants": *Ritchie*, C.J. (*Vogel* v. *Grand Trunk Rail. Co.*, 11 S. C. R. 612).

other things. This Act imposes on railway companies the duty to afford reasonable facilities for carrying all passengers, goods, and animals. There may be an exception in the case of dangerous goods (see the Railways Clauses Consolidation Act, 1845, s. 105), (44), but these are not now in question. The duty thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying, and is inconsistent with their right to refuse to carry such goods or animals except upon terms which are unreasonable. The machinery for enforcing this duty is provided by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to which it is unnecessary to allude further on the present occasion. The important point is that railway companies are bound to carry goods and animals which they have facilities for carrying. It would, however, be a mistake to suppose that railway companies are bound to carry as common carriers everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was in fact, decided in *Oxlade* v. *North-Eastern Rail. Co.* (1857), 1 C. B. (N.S.) 454, at p. 498 " (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at pp. 184, 185: *Lindley*, L.J.). (45)

" Generally, railway companies, like other carriers, were

Canadian Cases.

(44) Section 254 of the Railway Act, 1888.

(45) " I think, therefore, it must be held that, as said by *Strong*, J., in *Vogel's Case*, the effect of this legislation is to make the company common carriers of goods, or at least to impose upon them the same duties as those to which by the common law common carriers are subject in respect of the carriage of goods. But whether they receive goods as common carriers or merely as bailees for hire, the third sub-section of s. 246 equally prohibits them from contracting themselves out of liability to an action for a loss occasioned by their negligence, though there is nothing now, more than there was before this Act, to prevent them from limiting by any form of special contract their common carrier's

common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them. In 1830 the Carriers Act was passed for the protection of common carriers against the loss of or injury to parcels delivered to them, the value and contents of which were not declared. In 1845 the Railways Clauses Act was passed. Section 86 of that Act is permissive, and railway companies are not as such bound to be carriers, and s. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854, railway companies, unless compelled by some statute, could have refused to carry dogs or any other traffic which they did not profess to carry and did not generally carry, as common carriers, and no action would lie to compel them.

"Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ('traffic' by the interpretation clause including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners. (46)

"Since the passing of that Act railway companies cannot in my opinion absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability" (*ibid.*, at pp. 188, 189 : *Lopes*, L.J.).

Canadian Cases.

liability as insurers of the goods delivered to them for carriage" (*Robertson* v. *Grand Trunk Rail. Co.*, 21 O. A. R. 215: *Osler*, J.A.).

"I entirely agree with the Court of Appeal that this view was erroneous, and that according to the plain construction of the language of the 104th section [now Railway Act, 1888, s. 246] and without any reference to the English authority which arose upon a statute different in its terms, the prohibition of any limitation of liability therein contained is only co-extensive with the former part of the same section, which imposes upon railway companies the duties and obligations of common carriers" (*McMillan* v. *Grand Trunk Rail. Co.*, 16 S. C. R. 551 : *Strong*, J.).

(46) Sections 8 to 12 of the Railway Act, 1888, give to the Railway Committee of the Privy Council power to inquire into, hear, and determine, *inter alia*, any matter, act, or thing which, by this or the special Act, is sanctioned, required to be done, or prohibited.

(f) Undue Preference.

Whether in particular Circumstances there has been an Undue or Unreasonable Preference, Advantage, Prejudice or Disadvantage, is a Question of Fact.

"The application is made under the 2nd section of the Railway and Canal Traffic Act, 1854, which provides that 'No railway [*sic*] company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' (47) The question therefore, which the tribunal, whether it be the Court or the Commissioners, before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other.

"I think it clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether in particular instances there has been an undue or unreasonable prejudice is a question of fact. In *Palmer* v. *London and South Western Rail. Co.* (1866), L. R. 1 C. P. 588, *Erle*, C.J., said [at p. 593]: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused, being a question of fact depending on the matters proved in each case.' In *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1880), 3 Ry. & Can. Ca. 426, when it was before the Court of Appeal, not in the action brought by the Denaby Company against the railway company, but on an appeal arising out of the proceedings before the Railway Commissioners, Lord *Selborne*, then Lord Chancellor, said at p. 441: 'They gave a decided, distinct,

Canadian Cases.

(47) See ss. 240, 242 (D.), Railway Act, 1888, and *Vickers* v. *Canadian Pacific Rail. Co.*, 13 O. A. R. 210, *post*, p. 481.

and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but under these circumstances is not the reasonableness a question of fact? Is not it a question of fact and not of law whether such a preference is due or undue? Unless you could point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact.'

"The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself shew that it is an undue preference within the meaning of the Act, and further that whether there be such an undue preference or advantage is a question of fact, and of fact alone. No rule is given to guide the court or the tribunal in the determination of cases or applications made under the 2nd section of the Act of 1854. The conclusion is one of fact, to be arrived at looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with *Wills*, J., that it is impossible to exercise a jurisdiction, such as is conferred by this section by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, looking at all the circumstances of the case, that is looking at all the circumstances which are proper to be looked at; because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. From a decision upon a question of fact there is no appeal to this court, and therefore in order to shew that we have jurisdiction in any way to review the determination of the Railway Commissioners, it must be established first of all that they have made a mistake in point of law" (*Phipps* v. *London and North-Western Rail. Co.*, [1892] 2 Q. B. 229, at pp. 236, 237, 238: Lord *Herschell*). (48)

Canadian Cases.

(48) By s. 20 of the Railway Act, 1888, it is provided that "the Supreme Court of Canada shall hear and determine the question or questions of law arising thereon and remit the matter to the Railway Committee, with the opinion of the Court thereon."

THE RAILWAY AND CANAL TRAFFIC ACT, 1888.

(51 & 52 VICT. C. 25.)

Onus of Proof as to no Undue Preference.

Section 27.—(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

Considerations affecting the Case.

(2.) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the court, or the commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

Powers of Court or Commissioners.

(3.) The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

Section 27 of the Railway and Canal Traffic Act, 1888, is a Compromise.

"The provisions of s. 27 of the Act of 1888 have all the appearance of a compromise. The railway companies maintained, of course, that the commercial necessity of competition ought to

justify a rate otherwise indefensible. The traders insisted upon the contrary view. The legislature abstained from laying down the principle as contended for by either side, and contented itself with the cautious enactment contained in sub-s. (2) of s. 27.

"The legitimate interests of the railway company are therefore not excluded from consideration. The commercial necessity of meeting competition is always a fact in favour of the company. If it does nothing more than negative the suggestion that the *motive* was to give a preference, it gets rid of a possible inference which would be fatal to the case of the company; but when, all things having been taken into consideration, the case bears the aspect of an undue preference, the company may still be saved from an adverse judgment if it can be established that for different reasons the lower rate ought not to be raised *and* (not *or*) the higher rate ought not to be lowered" (*Liverpool Corn Trade Association* v. *London and North-Western Rail. Co.*, [1891] 1 Q. B. 120, at pp. 132, 133: *Wills*, J.).

Home and Foreign Merchandise.

"I think the object of the section [27 of the Railway and Canal Traffic Act, 1888] was to level differences—not to create arbitrary inequalities between the treatment of home and foreign merchandise; and I can see no reason or principle in leaving out of account the fact of a rival route by rail or water from the point of departure in this country to the point of arrival, in the case of goods coming from abroad, and taking it into account, as it clearly may be taken into account, where the comparison is between home goods only. It is further open to the criticism that the words 'same or similar services' are not used in the same sense in both sub-sections" (*Mansion House Association of Railway Traffic* v. *London and South-Western Rail. Co.*, [1895] 1 Q. B. 927, at p. 935: *Collins*, J.).

(g) Right of Action for Extortion.

"There is a case of *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97, in which the Lord Chancellor [Lord *Halsbury*] thought it might well be that no action would lie expressly for a breach of the second section of the Act [Railway and Canal Traffic Act, 1854], but that it was a matter for consideration, which he would prefer to reserve for a future opportunity, whether if a railway company committed a breach of that section, and, in committing that breach, extorted money for carriage, to which by law they were not entitled, the ordinary remedies at law for extortion were not available [at p. 112]. I do not understand the Lord Chancellor in that passage to mean that a person whose goods have been

carried by a railway company can by an action for extortion raise for the decision of a jury the question whether there has been a breach of the second section, but I understand him to mean, that what he desires to reserve for future consideration is, whether, after the decision of the special tribunal that there has been a breach of the second section, an action would not lie for extortion founded on the breach established in that way. In such an action there would be no contest whether there had been a breach or not, because that would have been established by the means provided by the Act, and the action would simply be to recover the moneys which by the decision of the special tribunal had been shown to have been extorted by the railway company; and it is obvious that an action of that sort would be perfectly free from the objection which I have pointed out, because it would be no longer open to the jury to consider whether there had or had not been a breach of the second section. They would be bound to accept the decision of the special tribunal, and the only matter which would remain would be a simple matter of calculation, upon the basis of the decision of the special tribunal, how much had been the excess which had been charged to the plaintiff, and which he had been compelled to pay. When that question arises it will have to be considered and determined" (*Lancashire and Yorkshire Rail. Co.* v. *Greenwood* (1888), 21 Q. B. D. 215, at pp. 219, 220; *Cave*, J.).

The proper Tribunal to apply to in order to Recover an Excess.(49)

"The first question which seems to be involved in the judgment of *Day*, J., though the last treated, is, that even supposing the rate charged [for certain traffic] to be excessive, the proper jurisdiction to apply to is that of the Railway Commissioners, and that the excess cannot properly be made the subject of debate in an ordinary court of law. My Lords, I notice this ground to clear my way for dealing with the questions I have enumerated, since I think it is covered by authority which I think your Lordships would be reluctant to shake. Very similar words came under review in *Great Western Rail. Co.* v. *Railway Commissioners* (1881), 7 Q. B. D. 182. There Lord *Bramwell*, when Lord Justice of Appeal, pointed out that where the complaint is that too much had been charged by the carrier the ordinary courts are the proper tribunal to decide such a question, and in that case *Field*, J., and

Canadian Cases.

(49) Section 11 of the Railway Act, 1888, provides that "the Railway Committee shall have power to inquire into, hear and determine any application, complaint or dispute respecting (*k*) tolls and rates for the transportation of passengers and freight." By s. 17 any decision or order made by the Railway Committee may be made any order of Court and enforced accordingly.

Manisty, J., Lord *Bramwell*, the present Master of the Rolls [then *Brett*, L.J.], and *Cotton*, L.J., actually restrained, by prohibition, the Railway Commissioners from entertaining the matter where it only raised the question of an excessive rate being charged, since that was a matter which might and ought to be determined in an ordinary court of law. 'I think,' says Lord *Bramwell*, 'there is a sort of presumption against the Railway Commissioners having jurisdiction in this matter, since it is quite certain that if there have been overcharges the moneys paid in excess can be recovered back by the person overcharged by the company'" (*Davis and Sons* v. *Taff Vale Rail. Co.*, [1895] A. C. 542, at pp. 547, 548: Lord *Halsbury*).

(h) Parcels and Enclosures.

Reasonable Charges to be made for Parcels great and small and Packages containing small Parcels.

1. "By virtue of these clauses (3 Geo. 4, c. xxxiv., s. 156, and 4 Will. 4, c. lv., s. 19), the company, in their character of common carriers, are bound to carry for *reasonable* charges, if reasonable charges are tendered to them. The first question then is resolved into this, whether for the two hampers, containing small parcels consigned to different persons, it is reasonable to charge either for each parcel contained in the hamper separately, or one penny per pound on the gross weight of each hamper and its contents.

"The charge is no doubt to be varied according to the trouble, expense, and responsibility attending the receipt, carriage, and delivery of different articles; and for small parcels more ought to be paid than a proportionate part, according to weight, of the price of larger parcels of the same commodity, by reason of the greater trouble in receiving, despatching and delivering them, and their exposure to a much greater risk of abstraction or loss. But, if all the small parcels are united in one large package, and delivered to the carrier in that package, consigned to one person, the trouble and responsibility are apparently reduced precisely to the same degree as if all the articles contained in the package were the property of the same owner, and intended to be delivered to him. There would seem, therefore, to be no right to charge for such package of distinct parcels, belonging to different owners, more than if they belonged to the same. But then it is argued on the part of the defendants, that there really is an increased responsibility, arising from the simple fact that each parcel is the property of a distinct owner, because it is said that, in the event of a misdelivery, the company would be liable to several actions of trover instead of one, and even in case of loss or damage by

neglect, each separate owner might maintain an action on the custom of England, in respect of his own goods. It is very doubtful, at least, whether, on the custom of England, separate actions could be maintained, as the relation of employer and carrier would not have subsisted between them and the company, but between them and the plaintiffs. As actions of trover, however, could be maintained, it would not be unreasonable to allow some additional remuneration, on account, not of the liability to pay greater damages, for they would be the same in both cases, but to pay the same damages by means of different suits. We are relieved, however, from the necessity of deciding what the precise amount of additional compensation (which at all events should be trifling) on this account should be" (*Pickford* v. *Grand Junction Rail. Co.* (1842), 10 M. & W. 399, at pp. 422, 423: *Parke*, B.).

No difference, in respect of Charge, exists between a Package and its Inclosures.

2. "It seems unreasonable to say, that, if a man sends in one parcel goods belonging to A., B., and C., the company shall be permitted to charge more for the carriage than if the whole were carried for one person" (*Parker* v. *The Great Western Rail. Co.* (1851), 11 C. B. 545, at p. 571: *Maule*, J.).

3. "The carrier is bound by the common law to forward the one parcel to A. in Leeds, and the other to B. in Leeds. When the one parcel gets to A. he will open it and deliver the several parcels to the different owners, and when the other parcel gets to B. he will open it and probably put the different parcels on the shelves of his shop; but the carrier has nothing to do with that,—he is required to deal with two parcels of the same articles and the same value; what business is it of his what is done with them at Leeds? A person not in the law, would say he could not see the difference between carrying two parcels of the same articles and same value to the same town, or why an extra charge should be made by the carrier who is under the obligation to charge equally to all . . . As to the way in which I dealt with this case at the trial, I stated that my own view was in conformity with the decision in the Court of Common Pleas [*Parker* v. *The Great Western Rail. Co.* (1851), 11 C. B. 545, and *Edwards* v. *The Great Western Rail. Co.* (1851), 11 C. B. 588]; but that there was a statement in a judgment of the Court of Exchequer in *Pickford* v. *The Grand Junction Rail. Co.* (1842), 10 M. & W. 399, which I read; and I left it to them to say, whether, assuming that to be so, they saw any ground for the defendants charging any further sum in respect of the supposed liability to several actions for improper dealing with the goods; and they said that in their opinion there

was not. In that opinion I entirely concur; and I think it would be wrong to allow carriers to charge a greater sum in respect of such supposed liability, there not being a single instance of several actions having been brought in respect of several parcels contained in the same package. I am therefore of opinion that there is no difference between what is called a package and an inclosure" (*Crouch* v. *Great Northern Rail. Co.* (1856), 11 Ex. 742, at pp. 755, 756, 759: *Martin*, B.).

(i) Section 7 of the Railway and Canal Traffic Act, 1854.

Liability for Neglect or Default notwithstanding any Notice.

Section 7.—(50) Every such company as aforesaid [railway or canal or railway and canal company] shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company *or its servants*, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say,) for any horse fifty pounds [50*l.*]; for any neat cattle, per head, fifteen pounds [15*l.*]; for any sheep or pigs, per head, two pounds [2*l.*]; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68

Canadian Cases.

(50) Railway Act, 1888, s. 246 (3). See judgment of *Burton*, J.A., in *Vogel* v. *Grand Trunk Rail. Co.*, 10 O. A. R. 170, in which he compares this section with s. 7 of the Railway and Canal Traffic Act, 1854.

[The Carriers Act, 1830], and shall be binding upon such company in the manner therein mentioned: Provided, also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party *unless the same be signed* by him, or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of 11 Geo. 4, and 1 Will. 4, c. 68 [s. 2, *ante*, p. 426] with respect to articles of the descriptions mentioned in the said Act.

The above provisions so far as the same were applicable, were extended to steam vessels worked by railway companies by paragraph 2 of s. 16 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), since repealed by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 59.

As to who are carrier's servants see *ante*, p. 364, Section IV.—Common Law Contract; (c) Delivery by the Customer to the Carrier; and *ante*, p. 435, Section VII.—The Carriers Act, 1830, notes to s. 8, and *post*, Section XIII.—Carrier's Agents and Servants.

(k) History of the Law of the Limitation of Liability, and Occasion for s. 7 of the Railway and Canal Traffic Act, 1854.

The section extends only to Negligence, or Default in the Nature of Negligence, or within the Scope of the Servants' employment; not to Theft without Negligence.

"It is clear law that a common carrier by land is, in the absence of exemption by statute, contract or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire, the act of God, the Queen's public enemies, and 'inherent vice' alone excepted; and he is, therefore, in the absence of such exemptions, liable at common law for loss by theft, whether by strangers or by his own servants. A *dictum* apparently to the contrary effect, attributed to *Willes*, J., in *Metcalfe* v. *London and Brighton, etc. Rail. Co.* (1858), 4 C. B. (N.S.) 307, at pp. 309, 310, was afterwards disclaimed by him in a note to *Coggs* v. *Bernard* (1704), 1 Sm. L. C. [See 9th ed., p. 246.]

"During the half-century which preceded the Carriers Act of 1830, it had, however, been established in many cases,—*e.g.*, *Nicholson* v. *Willan* (1804), 5 East, 507, and *Harris* v. *Packwood*,

(1810), 3 Taunt. 264—that the carrier could protect himself to some extent from liability for loss or damage (though not perhaps from an action for refusal to carry at the request of a customer, who could show a tender of the goods at the carrier's office, and an offer to prepay a reasonable charge there (see *Wyld* v. *Pickford* (1841), 8 M. & W. 443)), by insisting on a condition relieving him from liability; and for some time before 1830, it had become settled that he could do this by a mere public notice, although not 'brought home' to the customer in any way. (51) [*Qu.*, see *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at pp. 495, 496: *Blackburn*, J., *ante*, pp. 398, 399.]

"After the Act of 1830 (11 Geo. 4 & 1 Will. 4, c. 68), it was necessary for him to show a special contract for that purpose; but a general notice 'brought home' to the customer, was held to be a special contract, because the customer who sent his goods after notice of the condition was held to have assented to it. (See *per Blackburn*, J. in *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473.) The extent of the protection obtained by these contracts or notices was limited until about 1850. However general their terms, they were construed as covering only ordinary carrier's risks, or risks of the road, and not as extending to 'gross' negligence, and a contract or notice expressly extending to 'gross' negligence would have been held bad to that extent at any rate. Loss by theft by strangers, or by the carrier's servants, in the absence of gross negligence, was a risk of the road against which the contract or notice at common law protected the carrier entirely apart from the Act of 1830 (11 Geo. 4, and 1 Will. 4, c. 68); and notwithstanding s. 8 of that Act, which merely excepted theft by the servant out of the protection given by the mere force of the statute itself, and not out of protection obtained by contracts not depending upon the statute for their validity: *Butt* v. *Great Western Rail. Co.* (1851), 11 C. B. 140, as explained in *Metcalfe* v. *London and Brighton Rail. Co.* (1858), 4 C. B. (N.S.), 307; and in *Great Western Rail. Co.* v. *Rimell* (1856), 18 C. B. 575; and in the notes to *Coggs* v. *Bernard* (1704), 1 Sm. L. C., 9th ed., p. 246. By the end of 1852, however, it had, after much conflict of decisions, become settled by a series of cases (in the Queen's Bench: *Shaw* v. *York and North*

Canadian Cases.

(51) "In this country before the passing of the Act of 1871, just as in England before the passing of the Carriers Act, there was nothing to prevent carriers from contracting to limit their liability in any way or to any extent they thought proper. The object of the notice, condition, or declaration, both here and in England, was to impose terms upon the sender in restraint of the carrier's liability" (*Vogel* v. *Grand Trunk Rail. Co.*, 10 O. A. R. 186: *Osler*, J.A.).

Midland Rail. Co. (1849), 13 Q. B. 347 ; *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 16 Q. B. 600, *Chippendale* v. *Lancashire and Yorkshire Rail. Co.* (1851), 21 L. J. Q. B. 22 : in the Common Pleas, *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1852), 10 C. B. 454 ; and in the Exchequer, *Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, which extended to contracts and notices the construction that had been applied in *Hinton* v. *Dibbin* (1842), 2 Q. B. 646 to s. 1 of the Act of 1830), that the protection afforded by these contracts or notices 'brought home' to the customer might extend to negligence, however great, and that it made no difference whether the pleader alleged the negligence to be 'gross' or not. (52) After those decisions, the carriers' contracts or notices, when 'brought home,' protected them from everything except wilful acts, such as the conversion of the goods by the carrier himself, or by his agent for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee (see *Morritt* v. *North Eastern Rail. Co.* (1876), 1 Q. B. D. 302, and *Austin* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1852), 10 C. B. 454).

"It was to correct this state of the law that the Railway and Canal Traffic Act of 1854 [17 & 18 Vict. c. 31] was passed. The legal warfare had been waged about negligence only, and there is some presumption that statutes passed to amend the law are directed against defects which have come into notice about the time when the statutes passed (see *per Blackburn*, J., in *Peek's Case* (1863), 10 H. L. Cas. 473). The language of the Act points in the same direction. The enactment is that the company is to be liable for loss or injury to goods 'in the receiving, forwarding or delivering thereof occasioned by the neglect or default of the company or its servants.' These words are completely apt to describe every form of negligence, including theft by the company's servants, if occasioned or facilitated by negligence, and any default within the scope of the servants' employment ; but they are not apt to describe theft without the company's negligence. For very many years carriers had been allowed to exempt themselves from liability for all risks of the road not occasioned by negligence, including theft by their servants (*Butt* v. *Great Western Rail. Co.* (1851), 11 C. B. 140), subject only to the express enactments of the Act of 1830, and there is nothing to indicate that the law in this respect was thought to require amendment in respect of theft or any other of the risks of the road. If it was intended to make the companies liable for theft without

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Canadian Cases.

(52) See *Fitzgerald* v. *Grand Trunk Rail. Co.*, 4 O. A. R. 623 : *Moss*, C.J.A.

their negligence, there is a strong contrast between the inaptitude of the words used in 1854, and the direct language of ss. 4 and 8 of the Act of 1830. Having regard to the terms of the Railway and Canal Traffic Act, and to the history of the law, and the occasion for the Act, it seems most reasonable to hold that it extends only to negligence, or default in the nature of negligence, or within the scope of the servants' employment. The company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is—that, subject in the case of the valuables specified in the Act of 1830 to the provisions of s. 8 of the Act, they can, by contract or notice 'brought home,' exempt themselves from liability for such theft. It may be added that s. 8 of the Act of 1830 cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act, and are in strong contrast with the language used in s. 4, which was intended to be general. This view was plainly the view of the court in *Butt* v. *Great Western Rail. Co.* (1851), 11 C. B. 140, and it must always have been the view of pleaders, because all the precedents of replications of felony by the carrier's servants are to pleas of the Carriers Act, and not to pleas of contracts at common law" (*Shaw* v. *Great Western Rail Co.*, [1894] 1 Q. B. 373, at pp. 380, 381, 382, 383 : *Wright*, J., reading the judgment of the court (*Lawrance* and *Wright*, JJ.).

(l) "Neglect or Default of the Company" in Section 7 means Culpable Neglect or Default.

"The history of the section, [section 7 of 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act, 1854)] as contained in all the judgments from *Johnson* v. *The Midland Rail. Co.* (1849), 4 Exch. 367 downwards shows that the legislature, by the words 'loss occasioned by the neglect or default of the company,' meant loss occasioned by culpable conduct, and not a mere failure to deliver occasioned by inevitable accident without any blame. All the judges have agreed that the legislature interfered on account of the interpretation put by the courts on certain conditions imposed by railway companies on customers, in relation to the carriage of live animals, to the effect that the company would not be liable for any damage, however incurred. Although in each case the company only sought to apply the condition reasonably, the courts held that they claimed to be irresponsible 'for negligence, however gross, or misconduct, however flagrant.' [See *M'Manus* v. *The Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327] ; and these decisions created a

panic, lest the companies should inflict wilful injury and claim immunity. The evil, therefore, to be remedied was irresponsibility for negligence or other culpable conduct created by a condition, and the purpose of the legislature was to apply a remedy for that evil.

"The exemption from liability had been claimed where animals had either been killed or injured. The contest was whether the companies ought to be exempt from liability for such damage, if caused by their culpable conduct; and the more minutely the section is examined the more clear does it become that every word of the enactment has a rational effect, if it is construed to take away that exemption and no more. It creates a liability, not for any loss in respect of the non-performance of the duty of a carrier, which would include delay, detention, and other similar causes of complaint, but for the loss of or injury to a horse or other thing. The actions which are said to have caused this legislation being actions for injuries to horses. Further, it creates a liability for loss of or injury to a thing, not howsoever caused, but occasioned by the neglect or default of the company, the contest being whether a company could exempt themselves from liability for misconduct. Under this construction the statute would only come into operation where, in an action for the loss of or injury to a thing carried, the defence should be a condition exempting from liability. Then if the plaintiff showed that the loss of or injury to the thing was occasioned by the neglect or default of the defendant, the condition would be void unless the proviso which follows the enacting clause applies. By this it is provided that nothing contained in the statute should prevent companies from making such conditions as a court or judge before whom any question relating thereto should be tried, should adjudge to be just and reasonable" (*Harrison* v. *London and Brighton Rail. Co.* (1862), 2 B. & S. 152, at pp. 155, 156: *Erle*, C.J.). (53)

(m) The General Scope of the Act limits its Enactments to Railways and Canals belonging to or worked by the Companies mentioned in the Act.

"By the general law there is nothing to prevent railway carriers from putting such a limitation as this [that they will not be responsible for loss or detention of or injury to a passenger's luggage, except while the passenger is travelling by their own trains or boats] upon a contract into which they enter to convey beyond the extent of their own line; and the only ground upon which it can be said that they

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(53) "I have no doubt that the word 'neglect' has reference to negligence in carrying as well as negligence in omitting to carry" (*Vogel* v. *Grand Trunk Rail. Co.*, 11 S. C. R. 628: *Strong*, J.).

are prevented from putting such a restraint upon the contract is, that the Railway and Canal Traffic Act, 1854, prohibits them from so doing. Therefore, the case really becomes narrowed to the simple question whether the Railway and Canal Traffic Act, 1854, applies to such a case as this, and I am very clearly of opinion that it does not. It only applies to a line which the company against whom an action is brought are working for themselves. Section 2, which is the important section, I think indicates the whole scope and intention of the legislature. It enacts, 'Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively.' That being the general purpose of the Act, we come to s. 7, which is the one upon which the plaintiff is obliged to rely, and there we find it said, 'That every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void.' Now, it is to be observed that the language of s. 7, in speaking of the receiving, forwarding, or delivering of the goods and articles, corresponds exactly with the terms used in s. 2. Looking at the general scope of the statute, limiting its enactments to railways and canals belonging to or worked by the railway or canal companies, it seems to me impossible to say when you come to apply s. 7 that that section is to be carried any further than s. 2. The general provision is that whenever the company is working its own line or any other line which it has obtained power to work, it shall afford all reasonable facilities for the receiving, forwarding, and delivering of traffic; it shall not be a matter of option, it shall not be a matter in which the convenience of the company alone is to be considered. Railway companies have acquired vast powers by means of legislative interference, and the legislature has properly put upon them corresponding duties and obligations for the advantage and convenience of the public: because these powers were not intended to operate simply for the companies' own benefit alone, but also to insure a corresponding benefit to the public. Then s. 7 takes the matter up in the same way, and provides that companies shall not, as they have hitherto attempted to do, and in various instances have succeeded in doing, secure to themselves, by

notices and by special contracts, immunity in respect of losses by stipulating that they will not be responsible for the default or negligence of their servants, nor shall they be allowed to introduce any condition limiting their liability as carriers, except such as a court of law shall hold to be reasonable. Surely that means, as in s. 2, where they are acting on their own lines. It never can mean if companies choose to make special contracts with regard to goods carried beyond their own line, or lines which they have acquired powers to run over, that they shall not be at liberty to restrict those contracts by conditions. Duties are imposed upon them by this Act, but those duties are limited to their own lines. If they contract to carry beyond their own lines the whole matter is open and at large. I think it would be very wrong to put a forced and strained construction on these sections. It may be, in the case of English companies who undertake to carry, for instance, from London to the North of Scotland, under one contract, and pass over several railways which do not belong to them, that those companies may impose restrictions on their liability beyond their own line: but if inconvenience and mischief arise from such restrictions, it is for the legislature to interfere" (*Zunz* v. *South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539, at pp. 544, 545, 546: *Cockburn*, C.J.). (54)

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(54) "Then these duties and obligations were clearly prescribed in respect of a railway company's own line, and not with respect to other lines over which it might, if it chose, undertake to forward or carry, but in respect of which services its choice to undertake them or not was free and unaffected by any statutory duty whatever. From this it follows that in so far as the contract of carriage here beyond the terminus of their own line was one which the Grand Trunk Railway Company might have declined altogether, there was no statutory or other legal impediment to a contract by them limiting their liability either as carriers or otherwise in respect of the goods to be carried after they had left that company's own line" (*McMillan* v. *Grand Trunk Rail. Co.*, 16 S. C. R. 551: *Strong*, J.).

According to the decision of the Supreme Court in *Robertson* v. *Grand Trunk Rail. Co.*, a railway company may restrict its liability as carriers or otherwise with regard to goods which it is not compelled by statute to carry.

"In *Vogel's Case* this court held that this section applied to prevent the company from relieving themselves by contract from an action for the loss of horses received by them for transportation, such loss having arisen from the negligence of the servants of the company, and that the fact that what the defendants had done was merely to let to the plaintiff a car which he loaded with horses, and which the defendants undertook to draw, did not prevent the application of the section. The *ratio decidendi*, therefore, as it appears to me, was that the section, prohibiting, as it was held it did, the company from contracting against liability from loss by negligence, applied, by reason of the defendants having been by their tariff then in existence under an obligation

(n) General Notice Invalid—Signed Special Contract.

No General Notice Valid in Law for the Purpose of Limiting the Common Law Liability.

The common law liability may be limited by such conditions as the court or a judge shall determine to be just and reasonable and embodied in a special contract in writing signed by the owner or person delivering the goods.

"We find that by the express enactment of the legislature in 11 Geo. 4 & 1 Will. 4, c. 68 (The Carriers Act, 1830), no public notice or declaration could as such in any ways affect the liability of a carrier as regarded goods in general, though special contracts might be made as at common law; and it had been decided that such notices, or declarations, when brought home to the customer, did operate as being the basis of a special contract to carry on the conditions contained in such notices. It had also been decided that such conditions, when thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had further been decided that a special contract ought to be inferred from the act of a party sending goods after the receipt of a notice, even where the party protested against the notice. And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage

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to carry the horses delivered to them at a rate provided for in such tariff. But by the new tariff which has been adopted since the judgment in *Vogel's Case*, and which, approved in the manner required by the statute, has been substituted for the one which was in force when *Vogel's Case* was before the court, and has become a lawful tariff confirmed by the provisions of the statute in that behalf, the defendants are under no obligation whatever to carry racers, although they do by that tariff so approved and made valid in law, undertake to carry them at the same rate as they do carry horses of ordinary value, subject, however, to the condition that the owner shall incur all risk of loss or damage from any cause whatever including negligence. Such a condition, besides being perfectly reasonable and fair to be made in a contract for the carriage of animals which the defendants are under no obligation to carry, is made perfectly free from all doubt as to its validity by the tariff approved as required by the statute; the section, therefore, of the statute which declared that the railway company could not relieve themselves from an action for loss or damage arising from negligence of goods which the defendants were bound to carry by their tariff has no application in the present case, which is an action for the loss of a racehorse which they were not under obligation to carry and which by their tariff approved as required by statute, and so given the force of law, they only undertook to carry upon condition that the owner should bear the risk of all loss or damage from whatever cause arising" (*Robertson* v. *Grand Trunk Rail. Co.*, 24 S. C. R. 619: *Gwynne*, J.).

of goods, and, it was alleged, abused their advantages so as (in the language of Story, already cited) 'to evade altogether the salutary policy of the common law.'

"It was under these circumstances that the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31) was passed . . . The true construction of the Act is, I think, that which is very clearly expressed by Lord Chief Justice *Jervis*, in delivering the judgment of the Common Pleas in *Simons* v. *The Great Western*, — and *The North Western* v. *Dunham* (1856), 18 C. B. 805, 826, where he says [at p. 829], 'The fair meaning of the section [7], as it seems to me, is this:—The first branch of it declares that all notices, conditions, or declarations made and given by the company shall be null and void, in so far as they go to release the company from liability for loss of or injury to goods, etc., in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide in the next branch that this shall not prevent the company from making such conditions, which shall be adjudged by the court or judge before which any question relating thereto shall be tried, to be just and reasonable. (55) And farther, though just and reasonable, such condition or "special contract" shall not be binding unless signed by the person sending or delivering the goods.'" (56) (*Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at p. 507, 509: *Blackburn*, J.).

"My Lords, I concur entirely with the interpretation put upon that section [section 7 of 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act, 1854)] by the Lord Chief Justice *Jervis* in the case of *Simons* v. *The Great Western Rail. Co.* (1856), 18 C. B. 805, at p. 829. I think that the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the

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(55) "The pendulum may have swung too far in the opposite direction, and we may think it would have been proper to all parties if it had been left to the courts, as in England, to determine as to the reasonableness or otherwise of the condition, but it is difficult to believe that it was not intended by this legislation to place railway companies in a different position from that which they occupied in England under the Railway and Canal Traffic Act, and to prevent them from contracting themselves out of liability for negligence" (*Vogel* v. *Grand Trunk Rail. Co.*, 10 O. A. R. 188: *Osler*, J.A.).

(56) "There is nothing which in this country requires the contract between the carrier and the sender to be in writing, and I see no distinction between such a contract evidenced in the most formal manner by the signature of both parties and the contract which we have seen will be implied from sending goods on terms and conditions stated by the carrier" (*Osler*, J.A.: *ibid.*).

common law liability of the companies as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. It is true that the section is expressed in a confused manner, but those conclusions, I think, are plainly deducible from the cumbrous language which is there employed" (*ibid.*, at pp. 566, 567: Lord *Westbury*, L.C.).

"I agree, therefore, entirely with the view of this statute [17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act, 1854)] entertained by Chief Justice *Jervis* in *Simons* v. *Great Western Rail. Co.* (1856), 18 C. B. 805, at p. 829 and expressed in very clear and intelligible terms" (*ibid.*, at p. 576: Lord *Wensleydale*).

(o) The Real Question.

The Real Question is whether the Individual and the Public are sufficiently Protected from being unjustly dealt with by the Companies.

"The spirit and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, at p. 342. 'The real question,' says *Crompton*, J., in delivering the judgment of the Exchequer Chamber, 'is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly.' The mischief was supposed to consist in giving a practical monopoly to the railway companies by compelling people to enter into contracts whether they willed it or no. The Act says, 'If you have signed a written contract expressing a certain condition, a judge or a court shall see whether it is reasonable or not.' *Crompton*, J., says, and I think rightly says, that in order to judge whether it is reasonable or not you must look at this consideration, are the individual and the public sufficiently protected from being unjustly dealt with by the effect of that monopoly?" (*Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703, at pp. 710, 711: Lord *Blackburn*). (57)

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(57) "*Fitzgerald's Case* was decided prior to the railway legislation we are now considering. If, indeed, the defendants' liability is only that of bailees for hire, the terms so construed may be meaningless or inoperative, but that is the consequence of the enactment, which expressly disables them from

(p) Just and Reasonable Contract a question for Court—Condition Exempting wholly from Liability is prima facie Unjust—Alternative Offer.

1. The question whether a contract is just and reasonable within the Act must be determined by the court or judge alone.

2. A condition exempting the carrier wholly from liability for the neglect or default of himself or his servants is *primâ facie* unjust and unreasonable, but it is not of necessity so in every case.

3. The seventh section extends to all animals although the limitation of particular amounts of damages is confined to those animals expressly mentioned.

4. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement a reduction in the price below that which would be a reasonable remuneration for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common law liability, a condition thus offered may be just and reasonable.

The above rules will be found to be substantiated and illustrated by the excerpts following :—

Free Pass to a person sent with Cattle—Choice of Accepting or Refusing.

1. "The authorities cited on behalf of the plaintiff [*M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327 and *Lloyd* v. *Waterford and Limerick Rail. Co.* (1862), 15 Ir. Com. L. Rep. 37] shew that, in order to disentitle the owner of the cattle carried to complain, a *choice* must be left to him to accept or to refuse the offer of the company. If he accept it, he is disentitled. If he reject it, the company are thrown back upon or left to their common law liability. In the present case, I cannot see that any alternative was offered to the plaintiff. There is simply an offer to him to give a free pass to any persons whom he

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exempting themselves from liability for loss arising from their negligence. And whether their duty to carry arises from their being common carriers or from being bailees for hire, there is nothing in our Act corresponding with that proviso in the seventh section of the Imperial Railway and Canal Traffic Act, which enables carriers in England to relieve themselves from the liability for negligence imposed by that section by means of a special contract with conditions which a court or judge may deem just and reasonable" (*Robertson* v. *Grand Trunk Rail. Co.*, 21 O. A. R. 216 : *Osler*, J.A.).

may choose to send with his cattle. The choice of accepting or refusing to have his goods carried subject to the first condition is not given to him" (*Rooth* v. *The North Eastern Rail. Co.* (1867), L. R. 2 Ex. 173, at p. 178: *Kelly*, C.B.). (58)

Goods 'at Owner's Risk'—Delay caused by Negligence.

2. "This court in *Robinson* v. *Great Western Rail. Co.* (1865), 35 L. J. C. P. 123 determined, upon a contract in terms very similar to those of the contract in the present case, that the words 'at owner's risk' only exempted the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company. That case is directly in point, the only difference being that there the thing carried was live stock, and here goods" (*D'Arc* v. *London and North Western Rail. Co.* (1874), L. R. 9 C. P. 325, at p. 330: Lord *Coleridge*, C.J. See also *Mallett* v. *Great Eastern Rail. Co.*, [1899] 1 Q. B. 309). (59)

Conditions or Contract must be Reasonable in the Opinion of the Court—Alternative Offer.

3. "The section [7] itself must be construed in conformity with the principles finally settled by the House of Lords in *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473. According to that decision, not only must conditions made by a railway

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(58) Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death without a ticket or payment of fare, under a contract between the defendants and the Express Company:—*Held*, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death (*Jennings* v. *Grand Trunk Rail. Co.*, 15 O. A. R. 477). "In the absence of actual notice to the deceased that he was travelling at his own risk, that agreement might well be regarded, as between the railway company and the injured party, merely as a contract by the express company to indemnify the railway company. There being, then, as I hold, no agreement that the defendant should travel at his own risk, it is not material in an action like this that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely" (*Osler*, J.: *ibid.*).

(59) "My examination of the modern cases has led me to the conclusion that in none of them has it been decided, as a pure question of construction, that the use of the words "at owner's risk" frees the carrier from all liability for negligence" (*Fitzgerald* v. *Grand Trunk Rail. Co.*, 4 O. A. R. 625: *Moss*, C.J.A.).

company be just and reasonable in the opinion of the court and judge before whom any question relating to them shall be tried; but also contracts signed by the senders of goods must be just and reasonable in the opinion of the same tribunal. Further, it was held in that case, and again in *Ashenden* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190, that a contract or condition exempting a railway company from all liability in respect of goods unless their value was declared and an additional payment made was unreasonable. In *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473 the goods were marble mantelpieces. In *Ashenden* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190 the thing sent was a dog. As regards horses, cattle, sheep and pigs, however, s. 7 of the Railway and Canal Traffic Act, 1854, contains a proviso which itself limits the liability of railway companies to certain specified sums unless the sender of such animals declares them to be of higher value than those sums; in which case the railway companies may demand a reasonable percentage upon the excess of the value so declared above the specified sums. This proviso does not apply to dogs, but it does not follow that a similar principle may not be applied to dogs by special contract.

"The first branch of the proviso shows that as regards the animals specified a railway company is not liable in respect of horses, etc., the value of which is not declared beyond the specified amounts, even although the horses, etc., are injured by the negligence or even wilful misconduct of the company's servants. The proviso is express 'that no greater damage shall be recovered, etc.' and there is no qualification or exception with reference to the cause of injury. The second branch of the proviso authorizes a percentage on the value declared without reference to the distance to which the animals are carried; but the percentage must be reasonable. At the same time no test of reasonableness is given" (*Dickson* v. *Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, at pp. 185, 186 : *Lindley*, L.J.). (60)

Canadian Cases.

(60) The Grand Trunk Railway Company received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage, which contained the provision "the company shall in no case be responsible for any amount exceeding 100 dollars for each and any horse, etc" :—*Held*, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible," were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than 100 dollars, though the value of the horse largely exceeded that amount (*Robertson* v. *Grand Trunk Rail. Co.*, 24 S. C. R. 611).

4. "The 7th section of the Railway and Canal Traffic Act has been held to extend to all animals, although the limitation of particular amounts of damages is confined to those animals expressly named in the proviso. I have no doubt, however, but that the legislature intended special contracts limiting liability in respect of other animals to be framed on the same lines, and, *mutatis mutandis*, to be similar to those expressly provided for. . . . A condition exempting the carrier wholly from liability for the neglect and default of his servants is *primâ facie* unjust and unreasonable, but it is not of necessity so in every case. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement, a reduction in the price below that which would be a reasonable remuneration for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common law liability, a condition thus offered may be just and reasonable: *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703. These are no doubt cases where the railway companies are carrying as common carriers, but the same principle applies" (*ibid.*, at pp. 190, 191, 192: *Lopes*, L.J.).

5. "It is not open to doubt since the case of *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473 that a contract exempting the company from liability in the terms of the consignment note in the present case [viz. from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants] is *primâ facie* not just and reasonable, and that if no other alternative is offered to the consignor the company are liable for the negligence of their servants, notwithstanding the stipulations of the contract of carriage. It is equally well settled, since the decision of your Lordships' House in the case of *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703, that if the consignor has an offer *bonâ fide* made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses in consideration of a pecuniary benefit to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be so. . . . (61)

Canadian Cases.

(61) A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the

"I may remark before I proceed further, that in my opinion, the question whether a contract is just and reasonable within the meaning of the statute [the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31)] must be determined by the court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination" (*Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218, at pp. 228, 229: Lord *Herschell*).

6. "The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, as interpreted in *Peek* v. *North Staffordshire Rail. Co.* (1863) 10 H. L. Cas. 473, enacts in substance that, in the absence of a signed and reasonable contract for exemption, the railway company is to be liable for loss or injury to goods in the receiving, forwarding or delivering thereof occasioned by the neglect or default of the company or its servants. We are bound in this court by *Ashenden* v. *London, Brighton, and South Coast Rail. Co.* (1880), 5 Ex. D. 190 to hold the signed contract in this case does not avail the defendants under s. 7 of the Railway and Canal Traffic Act, 1854, on the ground that it purports to relieve them from liability for every kind of negligence or default, however gross and however completely the loss may be unconnected with the fact of the goods being valuables, and does so without any equivalent or beneficial alternative, and is, therefore, unreasonable" (*Shaw* v. *Great Western Rail. Co.*, [1894] 1 Q. B. 373, at pp. 378, 379: *Wright*, J., reading the judgment of the court (*Lawrance* and *Wright*, JJ.).

Canadian Cases.

allowance of a reduced rate of freight not to hold the company liable (*Cobban* v. *Canadian Pacific Rail. Co.*, 23 O. A. R. 115).

"I do not wish to repeat what I said in *Vogel* v. *Grand Trunk Rail. Co.*, and *Robertson* v. *Grand Trunk Rail. Co.*, as to the power of a railway company to contract itself out of liability for negligence in the carriage of goods received by it to be carried as a common carrier. In *Vogel's Case* was involved the very same point which we have to deal with here, though it is not presented in quite the same way upon the evidence, viz., whether the offer and acceptance of an alternative or reduced rate makes any difference. I have ventured to hold the opinion that it does not, relying upon the difference between the language of our Railway Act and of s. 7 of the Imperial Railway and Canal Traffic Act, the latter enabling a company to make a special contract with just and reasonable conditions whilst ours contains an absolute denial of power to escape from liability for negligence" (*Osler*, J.A.: *ibid.*).

THE REGULATION OF RAILWAYS ACT, 1868.
(31 & 32 Vict. c. 119.)

Limitation of Liability during Sea Transit.

Section 14. Where a company by through booking contracts to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea from the act of God, the King's [*sic*] enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section, the word "company" *includes* the owners, lessees, or managers of any canal or other inland navigation.

As to the meaning of the word "includes," see *ante*, pp. 196, 445.

THE REGULATION OF RAILWAYS ACT, 1871.
(34 & 35 Vict. c. 78.)

Limitation of Liability during Sea Transit in Vessels not belonging to the Railway Company.

Section 12. Where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel *not* belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss of or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company; provided that such loss of life or personal injury, or loss or damage to animals or goods, happens to the person, animals, or goods (as the case may be) during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

MERCHANT SHIPPING ACT, 1894.

(57 & 58 Vict. c. 60.) (62)

(a) Liability of Shipowners with regard to Fire.

Section 502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity.

(i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. [This section replaces s. 503 (1) of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which replaced 26 Geo. 3, c. 86, s. 2.]

26 Geo. 3, c. 86, s. 2 (replaced by 57 & 58 Vict. c. 60, s. 502)—Fire on a Lighter.

Defendants were owners of a vessel called *The Barbara*, lying at anchor at the port of Mobile, in the United States of America, and bound on a voyage at and from Mobile to Liverpool. Someone on behalf of the plaintiffs delivered to the defendants cotton to be carried by *The Barbara*, part of which was so carried, but the residue while on board a lighter for the purpose of being conveyed and shipped on board the *Barbara*, was destroyed by fire.

"The defendants were liable at common law: and, unless they can bring themselves within the terms of some Act relieving them, they remain liable. They plead a plea which it is said is justified by 26 Geo. 3, c. 86, s. 2. That enactment protects the owners of any ship from making good any loss which may happen to goods

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Canadian Cases.

(62) AN ACT RESPECTING THE LIABILITY OF CARRIERS BY WATER.

(Revised Statutes, Canada, 1886, 82.)

Section 2 (4). Provided that they shall not be liable to any extent whatsoever to make good any loss or damage happening without their actual fault or privity, or the fault or neglect of their agents, servants, or employees:

(*a*) To any goods on board any such vessel or delivered to them for conveyance therein by reason of fire or the dangers of navigation;

(*b*) Arising from any defect in or from the nature of the goods themselves, or from armed robbery or other irresistible force;

(*c*) To any gold, silver, diamonds, watches, jewels, or precious stones, money, or valuable securities, or article of great value not being ordinary merchandize, by reason of any robbery, theft, embezzlement, removal, or secreting thereof, unless the true nature and value thereof has, at the time of delivery for conveyance, been declared by the owner or shipper thereof to the carrier or his agent or servant and entered in the bill of lading or otherwise in writing.

'shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel.' Now we are to say whether the protection given by this Act extends to the facts put upon the record. We are to see what the legislature has said. We are not to consider what it may or may not have been politic to protect, but what it is that the legislature actually has protected. Now this declaration states that the goods were delivered on account of the plaintiffs at Mobile, and were there accepted by defendants to be by the defendants safely carried and conveyed to and shipped on board *The Barbara*, and carried and conveyed in her to Liverpool. The goods were lost: and, it must now be taken, lost by a fire occasioned by the negligence of persons on board a lighter, not belonging to the defendants, which was carrying the goods to the ship. These facts do not constitute a case which is embraced by the Act. This lighter cannot be considered as part of the ship *Barbara*: it is a a public lighter employed by the owners of that ship for the purpose of conveying the goods to her. Again, it seems that, to bring a case within the Act, the fire must be on board a ship which is the property of the defendants. In this case the fire was on board the lighter of which the defendants were not owners. It seems to me clear, therefore, that the facts do not bring the defendants within the enactment; and consequently, that their common law liability remains" (*Morewood* v. *Pollok* (1853), 1 El. & Bl. 743, at pp. 747, 748: Lord *Campbell*, C.J.).

(b) Non-liability of Shipowner with regard to undeclared Gold, Jewellery, etc.

Section 502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity. (63)

(ii.) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature

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Canadian Cases.

(63) Section 3. Carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessels; and the oath or affirmation of any such passenger shall be *primâ facie* evidence of the loss of or damage to such articles and of their value; provided that such liability shall not extend to any greater amount than five hundred dollars or to the loss of or damage to any such valuable articles as are mentioned in the next preceding section, unless the true nature and value of such articles so lost or damaged have been declared and entered as provided by the said section.

and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof. [This section replaces s. 503 (2) of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).]

"I am clear that the words of sub-s. (ii.) of s. 502 [The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60)] relate to any robbery, whether that robbery is the robbery of a passenger for whose act the company would not be otherwise responsible, or is the robbery of one of the servants" (*Acton* v. *The Castle Mail Packets Co., Limited* (1895), 8 Asp. M. C. 73, at p. 74: Lord *Russell*, C.J.).

(c) Limitation of Shipowners' Liability with regard to Loss of Life or Personal Injury, and Damage or Loss to Goods, Merchandise, etc. (64)

Section 503. (1.) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)

(*a.*) Where any loss of life or personal injury is caused to any person being carried in the ship;

(*b.*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*c.*) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(*d.*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say,)

(i.) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods,

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Canadian Cases.

(64) The limited liability extended by this Imperial statute to British and foreign vessel owners has been extended by R. S. C. ch. 79, s. 12, to all ships, whether British, Canadian, or foreign. Section 12 (1), (2), and (3) are practically the same as s. 503 (1), (2) of the Imperial Act.

merchandise, or other things, an aggregate amount not exceeding fifteen pounds [15*l.*] for each ton of their ship's tonnage ; and

(ii.) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds [8*l.*] for each ton of their ship's tonnage.

(2.) For the purposes of this section—

(*a.*) The tonnage of a steam ship shall be her gross tonnage without deduction on account of engine room ; and the tonnage of a sailing ship shall be her registered tonnage :

Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

(*b.*) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage.

(*c.*) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3.) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

[This section replaces s. 54 of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), and is extended by the Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14).]

(d) Non-liability of Shipowners in Cases of Compulsory Pilotage. (65)

Section 633. An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

[This section replaces s. 388 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).]

Canadian Cases.

(65) PILOTAGE ACT.

(R. S. C., 1886, c. 80.)

Section 57. No owner or master of any ship shall, in any case, be compelled to employ or to give his ship into the charge of a pilot, either on the ground of his being compelled to pay pilotage dues to any person or otherwise; and nothing in this Act shall exempt any owner or master of any ship from liability for any loss or damage occasioned by his ship to any person or property, on the ground either of such ship being in the charge of a licensed pilot, or of such loss or damage being occasioned by the Act or default of a licensed pilot, or on any other ground.

SECTION IX.

STATUTORY TOLLS, RATES, AND CHARGES.

(a) *Introductory*, p. 480.

(b) *Equality Clause in respect of Goods or Passengers*, p. 481.
(*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 90, 92).

(c) *Recovery of Overcharges*, p. 485.

(d) *List of Tolls*, p. 487.
(*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 93).

(e) *List of Fares of Passengers*, p. 488.
(*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 15).

(f) *Tramways Act*, 1870 (33 & 34 *Vict. c.* 78) *s.* 45, p. 488.

(g) *Equality Clause in respect of Passengers in a Railway Company's Steam Vessel*, p. 488.
(*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *ss.* 16, 17, 18.)

(h) *Railway and Canal Traffic Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 14, p. 490.

(i) *Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 10, 31, p. 490.

(k) *Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, p. 491.

(a) Introductory.

Formerly there was no obligation at common law on a common carrier to treat all customers alike. Then restrictions were imposed by the legislature by special Acts and usual clauses known as "Lord Shaftesbury's clauses." The Railways Clauses Consolidation Act, 1845, was afterwards passed.

"At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him.

"But the fact that the carrier charged others less, though it was evidence to shew that the charge was unreasonable, was no more

than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable: see per *Byles*, J., in *Baxendale* v. *Eastern Counties Rail. Co.* (1858), 4 C. B. (N.S.) 63, at p. 78, and per *Willes*, J., in *Branley* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 63, at p. 75. But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers.

"At first the legislature in each special Act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon those came to be usual clauses which the then Chairman of Committees of the House of Lords used to require to be inserted in all railway bills with more or less modification. They were known by his name as 'Lord Shaftesbury's clauses.' Finally, in 1845, the legislature embodied in a general Act [The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20)] those clauses which it was thought expedient should generally be inserted in Railway Acts" (*Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at p. 237: *Blackburn*, J.). (66)

(b) Equality Clause in respect of Goods or Passengers.

THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 VICT. c. 20.)

Power to Vary Tolls.

Section 90. *And whereas* it is expedient that the company should be enabled to vary the *tolls* upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purposes of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company

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Canadian Cases.

(66) Under the provisions of (D) 42 Vict. c. 9, in order to warrant or authorise a sale of goods for toll, such goods must remain in the possession of the railway company for at least a year unless such tolls have been demanded from the person liable to pay the same and payment thereof has been refused or neglected for the period of six weeks after such demand (*per Cameron*, C.J.: *Worden* v. *Canadian Pacific Rail. Co.*, 13 O. R. 657).

or of particular parties: It shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all *passengers*, and of all *goods* or *carriages of the same description*, and conveyed or propelled by *a like* carriage or engine, passing only over the same portion of the line of railway *under the same circumstances*; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway. (The word "goods" *shall include* things of every kind conveyed upon the railway. See s. 3.)

Compare the above section with s. 4 of the Canal Carriers Act, 1845 (8 & 9 Vict. c. 42).

Meaning of the word "Toll." (67)

The word "toll" *shall include* any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandize, articles, matters or things, conveyed on the railway (see s. 3).

With regard to the words "shall include," they mean "shall have the following meanings in addition to its popular meaning" (see the cases of *Dyke* v. *Elliott* (1872), L. R. 4 P. C. 184; *R.* v. *Hermann* (1879), 4 Q. B. D. 284; *Corporation of Portsmouth* v.

Canadian Cases.

(67) The expression "toll" includes any rate or charge made for the conveyance of any passenger, goods, or carriage, or for the collection, loading, unloading, cording or delivery of goods, or for warehousing or wharfage, or other service incidental to the business of a carrier (Railway Act, 1888, s. 2).

Subject to the provisions and restrictions in this and in the special Act contained, the company may, by byelaws, or the directors, if thereunto authorised by the byelaws, may, from time to time, fix and regulate the tolls to be demanded and taken for all passengers and goods transported upon the railway, or in steam vessels belonging to the company (s. 223).

Such tolls may be fixed either for the whole or for any particular portions of the railway; but all such tolls shall always, under the same circumstances, be charged equally to all persons, and at the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and goods and railway carriages of the same description, and conveyed or propelled by a like railway carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway (s. 224).

Smith (1883), 13 Q. B. D. 184, *ante*, p. 196, Chapter V.—Pledges; Section XIV.; and *Dilworth* v. *Commissioners of Stamps*, [1899] A. C. 99, at pp. 105, 106: Lord *Watson*).

"The third section above referred to clearly does not in any way limit or restrain the construction of the word 'tolls,'—it does not assume to define it; it merely specifies certain payments, which it shall be held to include, even if, *per se*, they could not be brought within any correct definition of it. Further, it is necessary to extend the construction beyond the strict technical meaning of toll *per se*; for toll *per se*, without the addition of thorough or traverse, or some adjunct applying it to the passage of goods or passengers, would be simply insensible with reference to a railway. It must clearly, therefore, mean at least a payment, the consideration of which is the passage of passengers, carriages, or goods, on the railway" (*Great Northern Rail. Co.* v. *South Yorkshire Rail. and River Dun Co.* (1854), 9 Ex. 642, at p. 644: *Coleridge*, J.).

An apportioned part of a through rate under s. 87 is not to be deemed a toll under s. 90. See *Hull, Barnsley, and West Riding Junction Railway and Dock Co.* v. *Yorkshire and Derbyshire Coal and Iron Co.* (1887), 18 Q. B. D. 761.

The Equality Clause applies generally.

"It must we think, be considered as settled that the 90th section of 8 Vict. c. 20 (The Railways Clauses Consolidation Act, 1845) as well as the provisions of 17 & 18 Vict. c. 31 (The Railway and Canal Traffic Act, 1854) and 36 & 37 Vict. c. 48 (The Regulation of Railways Act, 1873), apply to traffic generally, and are not limited to tolls strictly so called" (*Evershed* v. *London and North Western Rail. Co.* (1877), 2 Q. B. D. 254, at p. 267: *Mellor*, J., delivering the judgment of the court (*Mellor* and *Lush*, JJ.)).

Consideration of the Expressions; Goods or carriages of the "same" description; A "like" carriage or engine; Under the "same" circumstances.

1. "It is extremely difficult to understand exactly what the legislature meant by goods of 'a *like* description' and even by the words 'of the *same* description,' though at first sight more capable of interpretation, because the word 'same' is constantly used in popular language for 'similar.' It seems to me that the words 'same' and 'like' have not different meanings in the two Acts [the private Act and the Railways Clauses Consolidation Act, 1845], and that the words must be used not with reference to the contents of parcels, which the defendants have no means of knowing,

but to the parcels themselves 'whether' (as Mr. Justice *Willes* said in answer to your Lordships' questions to the Judges) 'they were like or different for the purpose of carriage.'

"I have felt greater difficulty in ascertaining the meaning of the words 'under the same' or 'under the like circumstances.' I do not see, however, how they can relate to anything else than the conveyance of the goods. To say that because the plaintiff is (what has been called) an intercepting carrier, and the other persons using the railway are wholesale dealers, therefore the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend" (*Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at p. 260: Lord *Chelmsford*).

The Words of the Equality Clause have no Elasticity at all—an Absolute Rigid Equality is demanded.

2. "Now as a matter of policy and expediency, it may well be that the appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that these other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway and not by the railway of the appellants. But with those considerations the plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of—whether in that way they will equalise their capacity for competing with other lines or not. The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic" (*London and North Western Rail. Co.* v. *Evershed* (1878), 3 App. Cas. 1029, at p. 1035: Lord *Cairns*, L.C.).

3. "I think that it is finally settled by *Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226 and *Evershed's Case* (1878), 3 App. Cas. 1029, that if passing over the same portion of the railway (a fact which was not disputed in either of these cases), the obligation to charge, in respect of goods of the same description, equally, is imposed if they are 'under the same circumstances,' and that the circumstances are those relating to the carriage of the goods, not the person of the sender; that the fact that the persons who are charged less are, as in *Evershed's Case*, so situated that they can go by another route, and probably will do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge. Neither is it a

difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade. But though in *Sutton's Case* and *Eversheds Case* the goods were only carried over the same portion of the line, and therefore it was not necessary to say anything as to whether it was essential, to bring the case within that section, that they should be carried over the same portion only, nothing is said to indicate any opinion that this was not essential" (*Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97, at p. 120: Lord *Blackburn*).

4. "No doubt when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord *Blackburn* points out in his judgment in *Eversheds Case* (1878), 3 App. Cas. 1029, at pp. 1037, 1038 the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute. Lord *Blackburn* said it might have been very reasonable even in that case to allow other considerations to weigh, but that the legislature had not done so" (*Phipps* v. *London and North Western Rail. Co.*, [1892] 2 Q. B. 229, at pp. 249, 250: Lord *Herschell*).

(c) Recovery of Overcharges.

Customers of Railway Companies can Recover for Overcharges by an Action for Money had and received. (68)

1. "The plaintiff's complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to

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Canadian Cases.

(68) In the absence of collusion the court will not inquire into the reasonableness of the rates charged by a railway company to an express company. A railway company, having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having, as employees of the railway company, the right to use the company's trucks and baggage-house as places for storing goods, and refused the same privilege to another incorporated express company, brought themselves within the provisions of s. 60 (3) of 42 Vict. c. 9 [now s. 242, Railway Act, 1888], which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal

others is the ground of his complaint of an overcharge to himself. Now if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received. In the language of the Court of Common Pleas, in the case of *Parker* v. *The Great Western Rail. Co.* (1844), 7 M. & G. 253 'the payments made by the plaintiff were not voluntary, but were made in order to induce the Company to do that which they were bound to do without them.'

"In another case of *Parker* v. *The Great Western Rail. Co.* (1851), 11 C. B. 545 and in *Edwards and Another* (*assignee of Parker*) v. *The Great Western Rail. Co.* (1851), 11 C. B. 588, the plaintiffs recovered in actions for money had and received overcharges of a similar description to those in the present case" (*Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at pp. 262, 263: Lord *Chelmsford*).

2. "As regards the only remaining question, namely, whether an action for money had and received is the proper remedy in such a case, I apprehend, my Lords, that that question was settled by the decision the *The Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, and *The Lancashire Rail. Co.* v. *Gidlow* (1875), L. R. 7 H. L. 517, where it was determined, as I understand it, that money extorted by inequality of charge was to be recovered in exactly the same way as if it had been money extorted by making an unreasonable charge, that is to say, by an action for money had and received" (*London and North Western Rail. Co.* v. *Evershed* (1878), 3 App. Cas. 1029, at p. 1039: Lord *Blackburn*).

Canadian Cases.

terms and conditions to any other incorporated express company demanding the same (*Vickers Express Co.* v. *Canadian Pacific Rail. Co.*, 13 O. R. 210).

"These clauses against the giving of undue advantage or privilege extend to the vast majority of all the company's transactions as to the carriage or transport of passengers and goods of all kinds. They would be held to apply, I think, to all persons alike, whether such persons were or were not engaged in the business of collecting and sending packages and goods not their own, and delivering the same at different points as directed" (*Hagarty*, C.J.O.: *ibid.*).

(d) List of Tolls.

How List of Tolls is to be Published.

THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 VICT. c. 20.)

Section 93. A list of all the tolls authorised by the special Act to be taken, and which shall be exacted by the company, shall be published by the same being painted upon one toll board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable. (69)

List of Tolls under Section 93 of the Railways Clauses Consolidation Act, 1845, read Reddendo Singula Singulis as far as any Particular Station is concerned.

An action was brought against the North Eastern Railway Company for refusing to carry the plaintiff's coals from Shincliffe station. There was no proper accommodation at Shincliffe station for the reception of coals. A placard containing the list of tolls charged by the company for conveying different articles, including coals, was placed up at Shincliffe station.

"The question is whether the defendants have held themselves out as common carriers of coals, in bulk from Shincliffe station. The list of tolls posted up at that station mentions coals amongst other articles. But it appears that there was no accommodation for taking coals at that station in bulk, and that it has not been the practice of the company to receive them there. It is the duty of a common carrier to carry in accordance with the conditions he holds out to the public, but where such conditions do not restrict him, he has an option as to the method in which he is to conduct his business. He may carry coals from particular stations only, and other articles from other stations only, as it may suit his convenience. The 93rd section of the Railway Clauses Consolidation

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Canadian Cases.

(69) The company shall, from time to time, cause to be printed and posted up in its offices, and in every place where the tolls are to be collected, in some conspicuous position, a printed board or paper exhibiting all the rates of tolls payable, and particularising the price or sum of money to be charged or taken for the carriage of any matter or thing (Railway Act, 1888, s. 230).

Act says that a list of all tolls authorised by the special Act to be taken, and which shall be exacted by the company, shall be published in legible characters at the stations or places where such tolls shall be payable. Such a list was put up at Shincliffe station, but *reddendo singula singulis*, it must be construed as being intended to apply, as far as that station was concerned, to the articles for which it was appropriate, and not as an undertaking to carry all the things mentioned in it from every station at which it might be published. No duty is imposed on the company by Act of Parliament of carrying coals from that station" (*Oxlade* v. *North Eastern Rail. Co.* (1861), 9 W. R. 272, at pp. 272, 273: *Erle*, C.J.).

(e) List of Fares of Passengers.

THE REGULATION OF RAILWAYS ACT, 1868.

(31 & 32 Vict. c. 119.)

Section 15. Every company shall cause to be exhibited in a conspicuous place in the booking office of each station on their line a list or lists, painted, printed, or written in legible characters, containing the fares of passengers by the trains included in the time tables of the company from that station to every place for which passenger tickets are there issued.

(f) The Tramways Act, 1870 (33 & 34 Vict. c. 78).

Tolls and Charges and List of the Same.

Section 45. The promoters or lessees of a tramway authorised by special Act may demand and take, in respect of such tramway, tolls and charges not exceeding the sums specified in such special Act, subject and according to the regulations therein specified. A list of all the tolls and charges authorised to be taken shall be exhibited in a conspicuous place inside and outside each of the carriages used upon the tramways.

(g) Equality Clause in Respect of Passengers in a Railway Company's Steam Vessel.

THE REGULATION OF RAILWAYS ACT, 1868.

(31 & 32 Vict. c. 119.)

Section 16. Where a company is authorised to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working, steam vessels for the purpose of

carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a *like* vessel passing between the *same* places under *like* circumstances; and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof, or in favour of or against any person using the railway in consequence of his having used or being about to use, or his not having used or not being about to use, the steam vessel; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway.

(With regard to the meanings of the words "like" and "same," see *Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226, at p. 260: *per* Lord *Chelmsford*, *ante*, pp. 483, 484.)

Account distinguishing Tolls and Charges.

Section 17. Where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularising the several items of which the last-mentioned portion of the charge may consist.

Tolls and Charges where Two Railways Worked by one Company.

Section 18. Where two railways are worked by one company, then in the calculation of tolls and charges for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles,) conveyed on both railways, the distances traversed shall be reckoned continuously on such railways as if they were one railway.

(h) The Railway and Canal Traffic Act, 1873 (36 & 37 Vict. c. 48).

Books showing Rates and Inspection thereof. (70)

Section 14. Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee.

(i) The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).

Disputes as to Tolls, Rates, or Charges.

Section 10. Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandize traffic by a company to which this part of this Act [Part I.] applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal. (71)

Conciliation Clause.

Section 31.—(1.) Whenever any person receiving or sending or desiring to send goods by any *railway* is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade.

(2.) The Board of Trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavour to settle amicably the differences between the complainant and the railway company.

Canadian Cases.

(70) See note (69), *ante*, p. 487.

(71) The railway committee shall have power to inquire into, hear and determine any application, complaint, or dispute respecting, *inter alia*, (K) tolls and rates for the transportation of passengers and freight; (L) the adjustment of such tolls and rates between companies; (P) unjust preferences, discrimination, or extortion (Railway Act, 1888, s. 11).

Section 36 extends the above provisions to canal and railway and canal companies.

As to the jurisdiction of and proceedings before the Railway and Canal Commissioners to hear and determine such complaints, see the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54).

As to the question by what standard the question of reasonableness is to be tried, see *Rickett Smith and Co.* v. *Midland Rail. Co.*, [1896] 1 Q. B. 260.

(k) The Railway and Canal Traffic Act, 1894 (57 & 58 Vict, c. 54).

Onus on Railway Company to Prove that Increase of Rate or Charge is Reasonable.

Section 1.—(1.) Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament.

SECTION X.

DANGEROUS GOODS.

(a) *Customer's General Legal Duty*, p. 492.

(b) *Customer's Statutory Duty*, p. 493.

(i.) *Railways*, p. 493.

(ii.) *Tramways*, p. 494.

(iii.) *Vessels*, p. 494.

(a) Customer's General Legal Duty.

As a matter of legal duty, a customer is bound to give reasonable notice of the dangerous character of goods, if he is conusant of the same, to the carrier ; and the customer is, civilly or criminally, responsible for the consequences that ensue from the omission to give such notice.

1. "Where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver, to be carried in the voyage, packages of goods of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature" (*Brass* v. *Maitland* (1856), 6 E. & B. 470, at p. 481 : Lord *Campbell*, C.J.).

(2.) "I apprehend, that, as matter of legal duty, a person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandize, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice. A simple instance of this, is the case of a merchant putting on board a ship goods which are liable under certain circumstances to spontaneous combustion, or which in the absence of extraordinary care are likely by escaping to damage other parts of the cargo. It is clear that such a person would be liable to an action at the suit of anyone who might be injured by his wrongful omission This doctrine, though more fully considered in the recent case of *Brass* v. *Maitland* (1856), 6 E. & B. 470 is by no means modern

It was considered in *Williams* v. *The East India Company* (1802), 3 East 192. The plaintiff there failed in the result for want of proof that the goods were put on board without due notice of their dangerous character: but the court treat the obligation of the shipper as not resting upon contract, but upon the duty to give notice. Lord *Ellenborough* says, at pp. 200, 201: 'In order to make the putting on board *wrongful*, the defendants must be conusant of the dangerous quality of the article put on board; and if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanour at least.' The court there treat it as a duty which is owed to all persons who may be injured by the neglect to give notice. What is there laid down may not, so far as the supposed criminal responsibility goes, be applicable to a case like this: but it clearly shews that there would be a civil responsibility for the non-performance of this duty by the defendant or his agent. The case of a shipment of dangerous goods may be an extreme case: but it serves to illustrate the general principle that, wherever a person employs another to carry an article which from its dangerous character requires more than ordinary care, he must give him reasonable notice of the nature of the article, and that, if he fails to do so, he is responsible for the probable consequences of his neglect" (*Farrant* v. *Barnes* (1862), 11 C. B. (N.S.), 553, at pp. 563, 564: *Willes*, J.).

(b) Customer's Statutory Duty.

(i.) Railways.

THE RAILWAYS CLAUSES ACT, 1845.

(8 & 9 Vict. c. 20.)

Dangerous Goods. (72)

Section 105. No person shall be entitled to carry, or to require the company to carry, upon the railway, any aquafortis, oil of vitriol, gunpowder, lucifer matches, or *any other goods which in the judgment of the company may be of a dangerous nature;* and if any person send by the railway any such goods without distinctly

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Canadian Cases.

(72) Section 253 of the Railway Act, 1888, is substantially the same as s. 105 of the Railways Clauses Act, 1845 (Imp.).

marking their nature on the outside of the package containing the same, or otherwise giving *notice in writing* to the book-keeper or other servant of the company with whom the same are left, at the time of so sending, he shall forfeit to the company twenty pounds [20*l.*] for every such offence; and it shall be lawful for the company to refuse to take any parcel that they may *suspect* to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact.

(ii.) TRAMWAYS.

THE TRAMWAYS ACT, 1870.

(33 & 34 VICT. c. 78.)

Dangerous Goods.

Section 53. No person shall be entitled to carry or to require to be carried on any tramway any goods which may be of a dangerous nature; and if any person send by any tramway any such goods without distinctly *marking* their nature on the outside of the package containing the same, *or* otherwise giving *notice in writing* to the book-keeper or other servant with whom the same are left at the time of such sending, he shall be liable to a penalty not exceeding twenty pounds [20*l.*] for every such offence; and it shall be lawful for such promoters or lessees to refuse to take any parcel that they may *suspect* to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact.

(iii.) VESSELS.

MERCHANT SHIPPING ACT, 1894.

(57 & 58 VICT. c. 60.) (73)

Part V.—Safety (Dangerous Goods).

Section 446—(1.) A person shall not send or attempt to send by any vessel, British or foreign, and a person not being the master or owner of the vessel, shall not carry or attempt to carry in any such

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Canadian Cases.

(73) SAFETY OF SHIPS (PREVENTION OF ACCIDENTS) ACT.
(R. S. C., 1886, c. 77.)

Section 14. Every person who sends or attempts to send by, or not being the master or owner of the ship, carries or attempts to carry in any ship registered in Canada, any dangerous goods, that is to say, aquafortis, oil of vitriol, gunpowder, nitro-glycerine, naphtha, benzine, lucifer matches, ... v

vessel, any dangerous goods, without distinctly *marking* their nature on the outside of the package containing the same, *and giving written notice* of the nature of those goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped or taking the same on board the vessel.

(2.) If any person fails without reasonable cause to comply with this section, he shall for each offence be liable to a fine not exceeding one hundred pounds [100*l.*]; or if he shows that he was merely an agent in the shipment of any such goods as aforesaid, and was not aware and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature, then not exceeding ten pounds [10*l.*]. (74)

Meaning of "Dangerous Goods."

(3.) For the purpose of this Part of this Act the expression "dangerous goods" *means* aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, any explosive within the meaning of the Explosives Act, 1875, and any other goods which are of a dangerous nature.

[By s. 3 of the Explosives Act, 1875 (38 & 39 Vict. c. 17) the term "explosive"

(1.) *Means* gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires, and every other substance, whether similar to those above-mentioned or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect; and

(2.) *Includes* fog signals, fireworks, fuzes, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of an explosive as above defined.]

As to the distinction between the two words "means" and "includes," see *ante*, p. 196, and *Dilworth* v. *Commissioners of Stamps*, [1899] A. C. 99, at pp. 105, 106: Lord *Watson*.

Canadian Cases.

other goods of a dangerous nature without distinctly marking their nature on the outside of the package containing the same and giving written notice of the nature of such goods and of the name and address of the sender thereof, to the master or owner of the ship, at or before the time of sending the same to be shipped or taking the same on board the ship, shall, for every such offence incur a penalty not exceeding five hundred dollars.

(74) Safety of Ships (Prevention of Accidents) Act, R. S. C. c. 77, s. 15.

False Description of Dangerous Goods.

Section 447. A person shall not knowingly send or attempt to send by, or carry or attempt to carry in, any vessel, British or foreign, any dangerous goods under a false description, and shall not falsely describe the sender or carrier thereof, and if he acts in contravention of this section he shall for each offence be liable to a fine not exceeding five hundred pounds [500*l.*]. (75)

Master's Powers over Dangerous Goods.

Section 448.—(1.) The master or owner of any vessel, British or foreign, may refuse to take on board any package or parcel which he *suspects* to contain any dangerous goods, and may require it to be opened to ascertain the fact. (76)

Throwing Dangerous Goods Overboard.

(2.) Where any dangerous goods, or any goods, which, *in the judgment of the master or owner* of the vessel, are dangerous goods, have been sent or brought aboard any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, the master or owner of the vessel may cause those goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master or the owner of the vessel shall be subject to any liability, civil or criminal, in any court for so throwing the goods overboard. (77)

Forfeiture of Dangerous Goods.

Section 449.—(1.) Where any dangerous goods have been sent or carried, or attempted to be sent or carried, on board any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, or under a false description, or with a false description of the sender or carrier thereof, any court having Admiralty jurisdiction may declare those goods, and any package or receptacle in which they are contained, to be, and they shall thereupon be, forfeited, and when forfeited shall be disposed of as the court direct.

(2.) The court shall have, and may exercise, the aforesaid powers of forfeiture and disposal notwithstanding that the owner

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Canadian Cases.

(75) Safety of Ships (Prevention of Accidents) Act, R. S. C. c. 77, s. 16.

(76) *Ibid.*, s. 17. (77) *Ibid.*, s. 18.

of the goods has not committed any offence under the provisions of this Act relating to dangerous goods, and is not before the court, and has not notice of the proceedings, and notwithstanding that there is no evidence to show to whom the goods belong; nevertheless the court may, in their discretion, require such notice as they may direct to be given to the owner or shipper of the goods before they are forfeited. (78)

Saving Clause.

Section 450. The provisions of this Part [V.] of this Act relating to the carriage of dangerous goods shall be deemed to be in addition to and not in substitution for, or in restraint of, any other enactment for the like object, so nevertheless that nothing in the said provisions shall be deemed to authorise any person to be sued or prosecuted twice in the same matter.

[The above provisions replaced the repealed sections 23—28 inclusive of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85).]

Where the object of the Act is to confer a benefit on any person and to protect him against the evil consequences which the statute was designed to prevent, and which have in fact ensued, he may maintain an action for the damages so caused.

"The argument of the defendant is, that the Act [Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70)] has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be

Canadian Cases.

(78) Safety of Ships (Prevention of Accidents) Act, R. S. C. c. 77, s. 19.

well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle" (*Gorris* v. *Scott* (1874), L. R. 9 Ex. 125, at pp. 128, 129: *Kelly*, C.B.).

[See the application of this principle in *Ross* v. *Rugge-Price* (1876), 1 Ex. D. 269; *Brain* v. *Thomas* (1881), 50 L. J. Q. B. 662; and *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402.] (79)

Canadian Cases.

(79) Section 22 provides that "so much of the Merchant Shipping Act, 1854 (Imp.), and of any other Act amending the said Act and forming part of the same, as is inconsistent with this Act is hereby repealed so far as relates to ships registered in Canada."

By s. 91 of the Merchant Shipping Act, 1894 (Imp.), it is provided that Part I. of that Act shall apply to the whole of Her Majesty's dominions, and to all places where Her Majesty has jurisdiction.

Section 735 of the (Imp.) Merchant Shipping Act, 1894, empowers the legislative authority of any British possession, by an Act or ordinance confirmed by Her Majesty in Council, to repeal wholly or in part any provisions of the Act relating to ships registered in such possessions; a power which, being contained in the Act itself, is clearly sufficient to preserve the right of colonial legislation on the subjects dealt with by that statute. (See the judgment of *Patterson*, J.A., in *Georgian Bay* v. *Fisher*, 5 O. A. R. 389, where the authorities are reviewed.)

SECTION XI.

END OF TRANSIT.

(a) *Delivery of Goods by Carrier*, p. 499.
- (i.) *Without Unnecessary Delay*, p. 499.
- (ii.) *Carrier to use all Reasonable Exertions*, p. 499.
- (iii.) *Within a Reasonable Time if none mentioned*, p. 500.
- (iv.) *Notice of Arrival of Goods*, p. 501.
- (v.) *Delivery or Tender of Delivery*, p. 503.
- (vi.) *Delivery Prior to Completion of Journey*, p. 503.

(b) *End of Transit by Act of the Consignor or Consignee*, p. 505.

(c) *Receipt of Goods by Consignee from the Master of a Vessel*, p. 512.

(d) *Delivery according to Custom and Usage*, p. 514.

(e) *Payment of Freight and Delivery of the Goods are usually concurrent Acts*, p. 515.

(f) *Non-delivery*, p. 518.

(g) *Neglect or Refusal by Consignee to Accept Goods, and Carrier's Duty and Expenses thereon*, p. 522.

(a) Delivery of Goods by Carrier.

(i.) Without Unnecessary Delay.

A carrier is bound to proceed without unnecessary delay or deviation in his usual and customary course and deliver the goods safely. See also *post*, Section XVI.—Charter Party and Bill of Lading, (d) Deviation.

(ii.) Carrier to use all Reasonable Exertions.

The carrier must do that which is within his power, and which it is reasonable to expect he should do for delivering the goods. He must use all reasonable exertions. (80)

Canadian Cases.

(80) It is the duty of the captain not merely to deliver the goods on the wharf, but as far as possible to separate the different consignments so as to render them accessible to their respective owners (*per Strong*, J.: *Ontario Salt Co.* v. *Larkin*, 36 U. C. Q. B. 486).

A package of goods marked "A. R. B." and addressed to the care of K., plaintiff's agent at Berwick, was forwarded by defendants' railway. The way bill which was sent to the station master showed only the shipment of a

(iii.) Within a Reasonable Time if none mentioned.

Where no time is mentioned for delivering goods carried, the obligation of the carrier is to deliver them within a reasonable time.

The above rules will be found among the following passages :—

1. "Where no time is mentioned for delivering goods carried, the obligation of the carrier is to deliver them within a reasonable time ; and that is a question of fact. The person who sends goods is not entitled to call upon the carrier to go out of his accustomed course, or to use extraordinary means of conveyance ; but the carrier must do that which is within his power, and which it is reasonable to expect he should do for delivering the goods" (*Hales* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 66, at p. 71 : *Cockburn*, C.J.).

2. "The obligation of the carrier to carry depends on his public profession (*Johnson* v. *The Midland Rail. Co.* (1849), 4 Exch. 367); and therefore he is bound to carry only according to the route which he holds out to the public. But then he is bound to deliver in a reasonable time having regard to that route. It is no breach of his duty that he does not carry by a shorter route than that which he professes. If the customer wishes his goods to be sent by a shorter route than the accustomed one, he should ask for it, and if refused he would exercise his choice of sending by another carrier. But when goods are sent by the usual route, the carrier must use reasonable diligence ; and whether he has done so is a question of fact" (*ibid.*, at pp. 71, 72 : *Blackburn*, J.).

3. "I think a common carrier's duty to deliver safely has nothing to do with the time of delivery ; that is a matter of contract, and when, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a time within which the carrier can deliver, using all reasonable exertions" (*Taylor* v. *The Great Northern Rail. Co.* (1866), L. R. 1 C. P. 385, at p. 387 : *Erle*, C.J.).

Canadian Cases.

package marked "A. R. B." without indicating the name or person who was to receive delivery. The goods arrived at Berwick station in regular course, and within two or three days after their arrival, K. asked for a package addressed "A. R. B." to his care, but was told by the station master that no such package had come. He made further enquiries and received the same answer. Subsequently the goods were stolen from the station building, and it was held that the refusal of defendants' servant to deliver the goods to the party authorized to receive them, as well as their detention contrary to his wishes constituted negligence for which defendants were liable (*Bell* v. *Windsor and Annapolis Rail. Co.*, 24 N. S. L. R. 521).

4. "The first duty of a common carrier is to carry the goods safely, and the second to deliver them, and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by law in the contract to deliver; as *Tindal*, C.J., puts it [in *Raphael* v. *Pickford* (1843), 5 M. & G. 551, at p. 558], when he says, 'the duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally'" (*ibid.*, at pp. 387, 388: *Byles*, J.). (81)

5. "Common carriers do indeed insure to this extent, that they will safely and securely carry the goods, but not to the extent of guaranteeing their arrival at any particular time: when the question arises, it must depend on the circumstances of each case what is a reasonable time. It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that he should either delay or deviate in his course, and he is justified in doing so. I see that *Tindal*, C.J., in *Davis* v. *Garrett* (1830), 6 Bing. 716, at p. 725, uses the words 'without *unnecessary* deviation' in describing the duties of carriers, which imply that deviation is sometimes justifiable" (*ibid.*, at p. 388: *Montague Smith*, J.).

(iv.) Notice of Arrival of Goods.

"There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person" (*Golden* v. *Manning* (1773), 3 Wils. 429, at p. 433). (82)

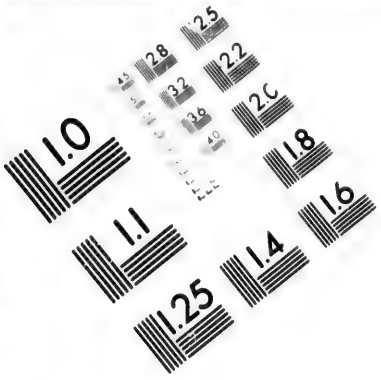
"I take it the law is very clear to this extent that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions) he

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Canadian Cases.

(81) The defendant undertook to carry from Buffalo and deliver to plaintiffs in Goderich, certain goods which were stopped and bonded by the Custom House officer in Stratford, of which the plaintiffs received no notice:—*Held*, that the railway were bound to carry out their contract or show some stoppage by a duly authorised officer (*Robson* v. *Buffalo*, 9 U. C. C. P. 183). See *Oneill* v. *Great Western Rail. Co.*, *post*, p. 502.

(82) It is sufficient to discharge the owner of a vessel conveying goods from port to port from liability arising from non-delivery of part of the goods, to show that they were delivered by the master of the vessel at the port to which they were consigned, and notice given during the usual business hours to the consignee (*McKay* v. *Lockhart*, 4 U. C. Q. B. (o.s.) 407).



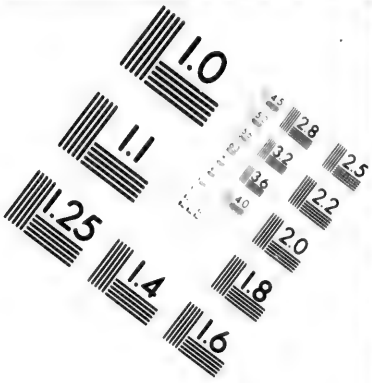
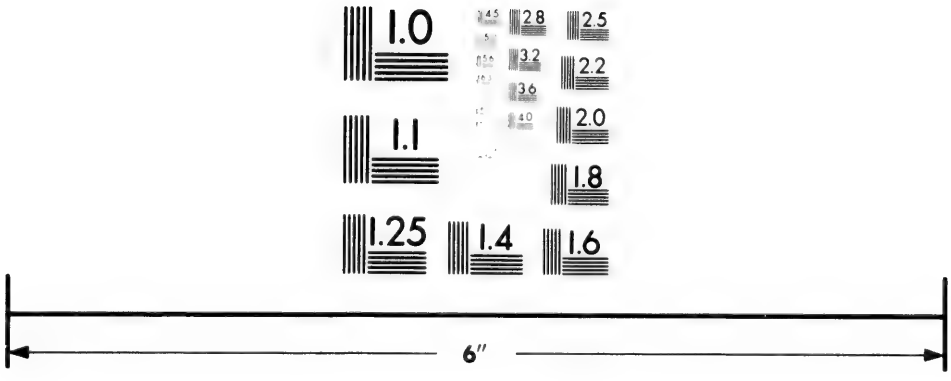
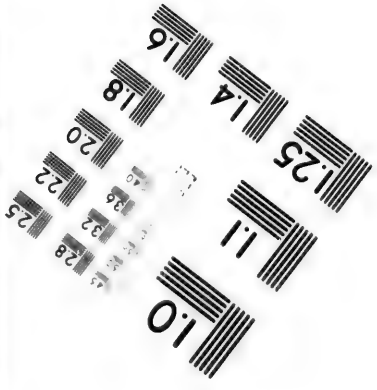
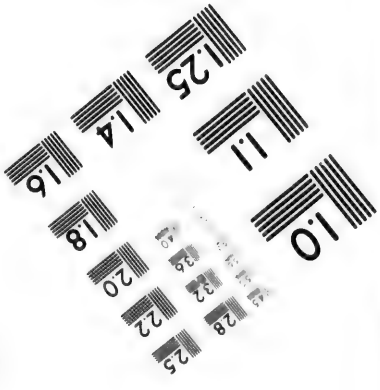


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may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. And after this notice and the consignee does not fetch the goods away, and becomes *in morâ*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee" (*Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256, at p. 260: *Blackburn*, J.). (83)

Canadian Cases.

(83) Defendants contracted to carry plaintiff's goods from Montreal to Portland, and then forward to St. John as opportunity might offer. The goods were destroyed by fire while in defendant's warehouse in Portland and without negligence on part of defendants:—*Held*, defendants not liable. *Per Allen*, C.J.: "We think the liability of defendants as carriers ended at Portland, and if they incurred any liability after the arrival of the goods there, it must be in some other character than that of common carriers (*Armstrong* v. *Grand Trunk Rail. Co.*, 2 S. C. N. B. Reps. 445).

A carrier may limit his common law liability so as not to be responsible for a loss by fire occasioned without negligence on his part (*Gordon* v. *G. W. Rail. Co.*, 34 U. C. Q. B. 224, distinguished: *ibid.*).

A carrier who received goods in bond at Suspension Bridge for carriage to Toronto was compelled by the law of custom to deposit them in a warehouse:—*Held*, that the goods being bonded goods subject to duty, and defendants having conveyed them within a reasonable time to their place of destination were not bound to give notice of their arrival there, and their duty as common carriers had ceased. "Where goods are imported in bond the law alters this general character of the common carrier's contract, by imposing the obligation of depositing them in a bonded customs warehouse, and that by such delivery the contract of the common carrier is fulfilled. The goods are delivered for the plaintiff at the only place where the defendants could lawfully deliver them, and the defendants were not, as I think, bound both to deliver and give notice, and therefore their duty as common carriers was fulfilled" (*Oneill* v. *Great Western Rail. Co.*, 7 U. C. C. P. 203; *Bowie* v. *B. B. & G. Rail. Co.*, 7 U. C. C. P. 191, confirmed; *McKay* v. *Lockhart*, 4 U. C. R. (o.s.) 407, distinguished: *Draper*, C.J.).

See also *Inman* v. *Buffalo and Lake Huron Rail. Co.*, 7 U. C. C. P. 325.

"It is laid down that it is the company's duty when the passenger's baggage reaches its destination, to have it ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can receive it, and the liability does not cease until a reasonable time has been allowed to the owner to do so" (*Vineborg* v. *Grand Trunk Rail. Co.*, 13 O. A. R. 93: *per Hagarty*, C.J.O.). "I think the mere delivery upon the platform is not of itself sufficient to absolve the defendants from responsibility as carriers, but it must still be considered as under their control as carriers, until the passenger has an opportunity of claiming it, and if it had been shown that the officer of the company had left the station without affording the plaintiff such an opportunity, their obligation as carriers would have remained undischarged until such opportunity had been afforded (*per Burton*, J.A.: *ibid.*).

(v.) DELIVERY OR TENDER OF DELIVERY—CARRIER NOT ALWAYS BOUND TO DELIVER AT A PRIVATE HOUSE.

"The carrier who receives a certain sum for carrying the game, is not bound, in consideration of that sum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up; then the business of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person to whom they are directed" (*Hyde* v. *The Trent and Mersey Navigation Co.* (1793), 5 T. R. 389, at p. 395: Lord *Kenyon*, C.J.).

A Tender of Delivery discharges the Carrier.

"It appears to me to be sufficiently proved by the cases as a general rule, that a carrier having once tendered a delivery has discharged himself of his obligation: because, otherwise, where is his liability to cease? where is the line to be drawn, if not there? To construe his undertaking in any other way would be attended with the greatest inconveniences: and I should, therefore, hold the rule to be as stated, in ordinary cases" (*Storr* v. *Crowley* (1825), 1 M'Clel. & Y. 129, at p. 136: *Alexander*, C.B.).

(vi.) DELIVERY PRIOR TO COMPLETION OF JOURNEY—COUNTERMAND—OBTAINING GOODS BEFORE JOURNEY COMPLETED—DIRECTIONS.

1. "A carrier is employed as a bailee of a person's goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is only bound to deliver goods according to the owner's first directions, is a proposition wholly unsupported either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot easily be got at, though it is usually otherwise. But suppose a traveller by railway did not wish to proceed on his journey, and left the carriage and asked for his luggage, which he would clearly have a right to do, if Mr. Gray's argument is correct, the company might say, 'No, we have contracted to carry it to the end of the journey, and we will take it on.' It is clear, therefore, that the contract with a carrier is to deliver the goods according to the directions of the owner" (*Scothorn* v. *South Staffordshire Rail. Co.* (1853), 8 Ex. 341, at p. 346: *Martin*, B.).

A Consignee may require the Goods to be Delivered and Receive them at any Stage of the Journey.

2. "It is clear that a consignee may receive the goods at any stage of the journey ; and though the consignor directs the carrier to deliver them at a particular place, there is no contract by the carrier to deliver at that place and not elsewhere. The contract is to deliver there unless the consignee shall require the goods to be delivered at another place" (*London and North Western Rail. Co.* v. *Bartlett* (1861), 7 H. & N. 400, at pp. 407, 408 : *Pollock*, C.B.). (84)

Canadian Cases.

(84) "I think the general rule to be collected from the case is, that the transitus continues until the goods have reached their final place of destination, as contemplated between the consignor and consignee, so that in the ordinary course of business they would remain there until further orders, not contemplated in the original contract, were given by the consignee. This rule may be subject to the qualification that when the goods have been entrusted to a common carrier for delivery the consignee may stop the transit, and intercept the lien, by taking actual possession in good faith before they have reached the designated destination" (*Wiley et al* v. *Smith*, 1 O. A. R. 193 : *Moss*, J.A. See also *Richardson* v. *Twining*, 2 N. S. R. 281).

"It is of course clear that the mere arrival of the goods at the place of destination does not end the transit. There must be a delivery, actual or constructive, as between the carrier and the consignee. Such delivery may be at the place of original destination, or even (by agreement of carrier and consignee) before the goods reach such place" (*Mollison* v. *Lockhart*, 30 N. B. R. : *King*, J.).

A cargo of iron was taken out of the ship in good order, and was sent down by the agent of the ship, in a lighter hired for the purpose, to Corbett's wharf. It sustained no injury in the lighter, but had been damaged by fresh water either on the railway wharf or in the shed. It appeared that the plaintiff had full knowledge of the arrival of the ship, and paid the freight, but could not obtain delivery at the railway wharf, as the approach to it was obstructed by the different lines of railway, and was not fit for teams :—*Held*, that defendants were liable (*Robertson* v. *Dominion Steamship Co.*, 1 Russell & Geldert (N.S.) 149).

"The mere arrival of goods at the place of destination is not necessarily a termination of the transit unless the carrier has made himself the agent to hold them for the vendee. The transit remains until the goods, if they have not come into the constructive, have come into the actual possession of the vendee ; and although they are landed at the place to which they are destined, unless the vendee has taken possession of them, they are still in transit, and the vendor, on the insolvency of the vendee, may still exercise his right to stop them *in transitu*" (*Anderson* v. *Fish*, 16 O. R. 481 : *Street*, J.).

The plaintiff's claim was for the loss of goods shipped to him at Emerson over the defendants' railway, which were destroyed by fire while still in the car. The car arrived at noon and the station agent immediately gave verbal notice, to a drayman, according to the usual custom, that there was some freight to be delivered by the drayman. The plaintiff had been accustomed

(b) End of Transit by Act of the Consignor or Consignee.

Any act done by the owner which is equivalent to taking possession of the goods, puts an end to the transit.

The cases following prove, and are examples of the above rule.

Owner Receiving Goods in his Own Lighter.

1. The defendant insured goods to London, *and until the same should be safely landed there.* The ship arrived in the port of London, and the owner of the goods sent his lighter, and received the goods out of the ship: but before they reached land, an accident happened whereby the goods were damaged; for which this action was brought against the insurer. Sir *William Lee*, C.J., held, the insurer was discharged. He said it would have been otherwise, had the goods been sent by the ship's boat, which is considered as part of the ship and voyage (*Sparrow* v. *Caruthers* (1745), 2 Str. 1235).

Discharge of Lighterman by the Owner of the Goods.

2. Action on a policy of insurance on a cargo of fish from Shetland to London. The policy was in the usual form "until the cargo should be discharged and safely landed." On the arrival of the ship, the goods insured were put on board a lighter hired in the usual way, and brought to a wharf belonging to the plaintiff, in the afternoon, but in consequence of the roughness of the weather, could not be landed that evening.

"The goods were brought in the lighter to the plaintiff's wharf, and if nothing had happened to relieve the lighterman from that duty, he would have been bound to set some person to watch over the goods until they should be landed. But the owner of the goods in this case dispensed with the obligation of the lighterman to take charge of them during the night, and took them into his

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Canadian Cases.

to have his goods delivered by the drayman. He was out of town that afternoon and received no other notice of the arrival of the goods. The car was left standing near the elevator and was burned during the following night:—*Held*, that under the circumstances the customary notice to the drayman was sufficient notice to the plaintiff of the arrival of the goods, and that a reasonable time had elapsed for such notice to reach the plaintiff and for him to remove the goods; that the transitus was at an end, and the liability of the defendants as common carriers had ceased before the fire took place, and that the evidence did not warrant the finding that the defendants had been guilty of negligence in leaving the car when they did, and that, therefore, they were not liable for the goods in question (*Burdette* v. *Canadian Pacific Rail. Co.*, 10 Man. Reps. 5).

own custody ; and while they were in his custody they were lost. Can it be contended then that by such conduct the plaintiff did not discharge the lighterman ? If he did discharge the lighterman he placed himself in the same situation as if the goods had been actually landed and delivered. It is argued that it does not appear that any care would have prevented the accident which happened ; as to which I will only observe that neither does it appear that the accident might not have been prevented by extraordinary diligence. It appears to me that this case is not distinguishable from that of *Sparrow* v. *Caruthers* (1745), 2 Str. 1235" (*Strong* v. *Natally* (1804), 1 B. & P. N. R. 16, at pp. 18, 19 : Sir *James Mansfield*, C.J.).

End of Transit by the Owner of the Goods Warehousing them.

3. The Court, in *Rowe* v. *Pickford* (1817), 8 Taun. 83, at p. 85, observed that—

"This case must be governed by *Leeds* v. *Wright* (1803), 3 B. & P. 320, and *Scott* v. *Pettit* (1803), 3 B. & P. 469, in the latter of which it was held, that where a trader had no warehouse of his own, but used that of his packer, for receiving goods consigned to him, the *transitus* of such goods was at an end upon delivery of them to the packer. That the case of *Hunter* v. *Beal* (1785), 3 T. R. 466 *n.*, was only a question, whether a packer was an intermediate man, and wanted the material feature, which marked the present case ; namely, the fact that the warehouse of the carriers was the place of final delivery ; and moreover, that the impression in Lord *Ellenborough's* mind in *Dixon* v. *Baldwen* (1804), 5 E. 175, at p. 184, appeared to be adverse to the decision in *Hunter* v. *Beal*. In *Richardson* v. *Goss* (1802), 3 B. & P. 119, at p. 127, *Chambre*, J., said, that he was strongly inclined to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse ; and in *Scott* v. *Pettit* (1803), 3 B. & P. 469, at p. 472, Lord *Alvanley* said, he perfectly coincided with Mr. Justice *Chambre* in that which he had intimated in the former case. Both these cases were recognised in *Dixon* v. *Baldwen* (1804), 5 E. 175, and there confirmed by Lord *Ellenborough*." (85)

Canadian Cases.

(85) "Further consideration has satisfied me that when goods have reached their place of destination, and have been delivered by the consignor to the consignee, who has bonded them in his own name, and who has sold and delivered part of the same consignment of goods, the transitus must be considered at an end" (*Wiley* v. *Smith*, 2 S. C. R. 10 : Sir *W. B. Richards*, C.J).

End of Transit by Consignee doing Something Equivalent to taking Possession of the Goods.

4. "Where a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the *transitus* is at an end" (*Foster* v. *Frampton* (1826), 6 B. & C. 107, at p. 108: *Bayley*, J.).

End of Transit by Owner letting Goods remain at Carrier's Warehouse.

5. "There is a case of *Foster* v. *Frampton* (1826), 6 B. & C. 107, which comes very near the present: it was there decided, that when a vendee, for his own convenience, had desired the carrier to let the goods remain in the carrier's warehouse until he should receive further directions, the *transitus* was to be considered at an end, and the vendor was not entitled to stop *in transitu*, on the insolvency of the vendee" (*Allan* v. *Gripper* (1832), 2 Cr. & J. 218, at p. 222: *Bayley*, B.).

For stoppage *in transitu*, see *post*, Section XX.

When a carrier's liability as insurer ends and his liability as a warehouseman begins would seem to depend upon the time when the delivery to or the taking of possession by the consignee took place. (86)

Canadian Cases.

"The possession of the Custom House authorities in this case was that of the vendee. The system of bonding is merely to facilitate trade, and numerous cases show that goods in bond may be dealt with by a mere transfer of delivery orders. The Custom House officer undertook to hold, not for the vendor but for the purchaser. The case is, therefore, precisely the same as if the goods had come into the actual possession of the vendee, and had then been deposited by him with a bailee" (*Strong*, J.: *ibid.*).

(86) In *Mayer* v. *Grand Trunk Rail. Co.*, 31 U. C. C. P. 248, one of the conditions under which defendants accepted goods for carriage was that the company should not be liable for any goods left until called for, or to order, or warehoused for the convenience of the parties to whom they belonged and that the warehousing of all goods should be at owner's risk. On arrival, the goods were warehoused, and plaintiff, on receipt of advice note, called and obtained permission to leave them there. The goods being lost, it was held that defendants held as warehousemen, and not as carriers, and therefore the condition protected defendants from liability.

"There is no doubt that defendants' duties as carriers of the goods in question had ceased. When the owner, after notice of the arrival of goods,

Warehousing Goods in Carrier's Warehouse.

1. The defendants were common carriers of goods for hire from Stourport to Manchester. According to the course of business, when goods were sent from Stourport to go beyond Manchester, if any carrier to the place of their destination were at Manchester ready to receive them, they were immediately delivered upon payment of the carriage from Stourport to Manchester; and if not, the defendants kept them in their warehouse till a carrier arrived to whom they were delivered, on making the above payment, the defendants not charging anything for lodging and keeping the goods in their warehouse. The goods in question were consumed while in the defendants' warehouse by an accidental fire, and before any carrier came from Stockport, to whom they could be delivered. (87)

Canadian Cases.

either requests the company to permit him to leave the goods in their warehouse or omits or neglects to remove them, he is, in my opinion, bound by the terms of the condition unless he clearly makes out an agreement by the company to hold them on some other terms" (*Osler*, J. : *ibid.* ; *McCrossen* v. *Grand Trunk Rail. Co.*, 23 U. C. C. P. 107, distinguished).

Defendants, a railway company, received a case of hats for carriage to plaintiffs. The contract provided that the company would not be responsible for any goods left until called for, or to order, warehoused for the convenience of the parties to whom they belong, or to whom consigned, and that the delivery of the goods will be considered complete, and the responsibility of the company terminated when placed in the company's shed or warehouse :— *Held*, that the condition would only relieve from liability as common carriers, and not as warehousemen, and that being bound in the latter capacity to deliver the goods, they were liable for the loss sustained by the detention (*McCrossen* v. *Grand Trunk Rail. Co.*, *supra*).

In a contract to carry subject to a condition that no claim for damages to, loss of, or detention of goods should be allowed unless notice in writing and the particulars of the claim for the said loss, damages, or detention, are given to the station freight agent at the place of delivery within thirty-six hours after the goods in respect of which the said claim is made are delivered, it was held that such notice was required though the place of delivery was off the defendants' line. The defendants had agreed to forward the goods from the termination of their own line to destination, and were therefore carriers, not warehousemen, for the whole time that the goods were in their possession, notwithstanding a delay of a month in so forwarding the goods (*Mason* v. *Grand Trunk Rail. Co.*, 37 U. C. Q. B. 163).

(87) Plaintiff's goods while on their way from Newmarket, Ont., to Chatham, N.B., and in defendants' warehouse in Toronto were burned. Defendants' line terminated at Toronto, and under the special contract they were to forward goods to destination by public carrier as opportunity might occur. The defendants were held not liable for loss of goods by fire, as they had expressly limited their liability as carriers. They were not liable as warehousemen because no negligence was shown. *Per Rose*, J. : "As warehousemen

"If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as an insurer; and the reason given in the books (whether well or ill-founded, is immaterial here) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches" (*Garside* v. *The Proprietors of the Trent Navigation* (1792), 4 T. R. 581, at p. 582: Lord *Kenyon*, C.J.).

"The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods" (*ibid.*: *Buller*, J.).

When a Carrier's Liability as an Insurer ends and his Ordinary Liability as a Bailee begins.

2. "A distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as warehouseman, as is the case with many of the canal companies: and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also" (*Cairns* v. *Robins* (1841), 8 M. & W. 258, at p. 263: Lord *Abinger*, C.B.). (88)

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they would not be liable for loss by fire unless they had been guilty of ordinary negligence" (*Brodie* v. *Northern Rail. Co.*, 6 O. R. 180).

Where the condition was that when goods are addressed to consignees beyond the places of the company's stations they will be forwarded by public carriers, and the delivery of the goods by the company will be considered as complete and the responsibility of the company will be considered to have ceased when such carriers shall have received notice that the company is prepared to deliver to them the goods:—*Held*, plaintiff could not recover for an injury to the goods arising after they had left defendants' line (*Rennie* v. *Northern Rail Co.*, 27 U. C. C. P. 153).

(88) It is well-established that the liability of carriers by railways *qua* carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time afterwards for their delivery. Afterwards the responsibility is reduced from that of insurers to one of bailees liable only for neglect of duty (*McMillan* v. *Grand Trunk Rail. Co.*, 16 S. C. R. 543).

The plaintiff, during the month of January, loaded defendants' vessel, which was frozen in the ice in Port Hope harbour, with a cargo of peas to be carried in the vessel on the opening of navigation to Kingston. While the

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goods were so on board, the vessel struck a sunken rock, unknown to all parties, at the bottom of the harbour, which broke a hole in the vessel's bottom, causing her to sink, and damaging the cargo:—*Held*, that the defendants were exonerated by virtue of Dom. Statute, 37 Vict. c. 25, s. 1 (1), now Consol. Statute (1886), c. 82. This statute provides that carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable to any extent whatever to make good any loss or damage happening without their actual fault or privity, or the fault or neglect of their agents' servants or employees. *Per Gwynne*, J.: "When, under the peculiar circumstances of this country, a carrier by water receives in his ship while it is fastened in the ice in winter, goods to be carried by him in the ship upon the opening of navigation, whether he is to be considered as holding the goods until the opening of navigation in the character of a warehouseman only, or as a carrier, must, as it seems to me, depend upon the intention and agreement of the parties in each particular case; for although the responsibility of a carrier attaches in respect of goods delivered to him for carriage upon the delivery of the goods, that cannot deprive the parties of the right to contract that when the goods are placed on board the ship in which they are intended to be carried, they shall be held in the ship as in a warehouse and subject only to the responsibility of a warehouseman, and when nothing is said expressive of the intention we must infer the intention from their acts" (*Cluxton* v. *Dixon*, 27 U. C. C. P. 170).

When in an action against common carriers from Kingston to Montreal, it was proved that the plaintiff had sent his goods to the defendants at a season of the year when they could not be forwarded, and the defendants received them into their store at Kingston to be forwarded at the earliest opportunity, and before the navigation had opened, or time for transportation had arrived, they were destroyed in the defendants' storehouse without their default by an accidental fire, and a verdict was found for the plaintiff:—*Held*, that it ought to have been distinctly left to the jury to find whether the defendants received the goods only as warehousemen until the opening of navigation or whether their liability as carriers commenced from the moment of their receipt, and it not having been so left to them, the Court granted a new trial. *Per Robinson*, C.J.: "Nothing is better settled than that in the case of common carriers the rule which makes them in effect insurers against all risks (acts of God, and the King's enemies excepted) is inflexible." *Per Jones*, J.: "In this province [U. C., now Ontario] the persons commonly designated as forwarding merchants are those who receive goods in their own warehouses to be forwarded in their own vessels, on their own account, and are therefore common carriers. A warehouseman is a person who receives goods to be stored, subject to the order of the owners, receiving a compensation for such storage. A wharfinger is in general also a warehouseman, having a warehouse in connection with his wharf, and is a person who receives goods to store or ship. Neither the wharfinger nor warehouseman are liable as common carriers, being only responsible for negligence on the part of themselves and their servants. If the person is at the same time a warehouseman and a carrier like the present defendant, and he receives goods into his warehouse to be forwarded according to the future orders of the owners, if the goods are lost by fire before such orders are received or the goods are put *in transitu*, he is not chargeable as a common carrier, but only as a warehouseman" (*Ham* v. *McPherson*, 6 U. C. Q. B. (o.s.) 360).

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"Looking at the nature of their business, etc., the necessity of immediate delivery out of their cars is apparent, and the terminus of the transport being reached, the duty of common carriers is fulfilled by placing them in a safe place, alike safe from the weather and from the danger of loss or theft; and whatever the responsibility the defendants incurred, if that safe place were one under their own charge and control, it assuredly is not the responsibility of a common carrier" (*Inman* v. *Buffalo and Lake Huron Rail. Co.*, 7 U. C. C. P. 325: *Draper*, C.J.).

Defendants received 2,000 bundles of hoop iron to be carried to London (Ont.) and delivered at their station there to the plaintiff. On its arrival, the plaintiffs having no agent in London, and living in Montreal, defendants sent to them their advice note of the arrival, and unloaded the iron in their yard, where it remained for nearly three weeks, and was injured by rust and exposure:—*Held*, that the defendants as common carriers were not liable. Eighteen bundles were missing, and the defendants' officer not having checked the number taken out of the cars could only say that if the 2,000 bundles arrived there it was all placed in the yard, and must have been stolen from there:—*Held*, defendants were liable for the eighteen bundles.

"It is, we think, clear and well settled from numerous cases that the duty of the defendants as common carriers was fulfilled and ceased when they deposited the goods at the London station, to which place they were consigned for delivery. If the consignee of goods or some person on his part is not at a station to take delivery of the goods, or the consignee is not known there or cannot be found, it is, we suppose, in such a case the duty of defendants to deposit the goods in a place of safety and ready to be delivered to the parties when called for, and it may be their duty to take care of them for a reasonable time; but for whatever may happen to the goods after they were discharged from the cars and deposited in a warehouse or other place the liability of the defendants, if any, would be that of warehousemen, and not as carriers" (*Hall* v. *Grand Trunk Rail. Co.*, 34 U. C. Q. B. 517: *Morrison*, J.).

Under a condition in a railway shipping bill the delivery of goods was to be considered complete, and the responsibility of the company to terminate, when the goods were placed in the company's warehouse at their destination:—*Held*, that the station was the destination of the goods, and not the village of the same name five miles off, and that the duty of the common carrier ceased when the goods were placed in the company's shed.

"Having regard to the various cases, and after carefully analysing the different authorities cited, I have come to the conclusion that the principle of law which must govern is that the consignee must have a reasonable time within which to take away the goods, and that reasonable time begins from notice or knowledge; what is notice or knowledge turns on the facts in each case, the custom of the carrier and the practice of the party or consignee. It is laid down in the case of *Chapman* v. *Great Western Rail. Co.*, 5 Q. B. D. 278 (the principles of which govern this case), that if notice by the carrier to the consignee is not absolutely necessary, there must be knowledge by the consignee of the date of the arrival of the goods, or such facts must exist as would charge him with neglect if he had not knowledge, and that time begins from knowledge, either actual or imputed" (*Richardson* v. *Canadian Pacific Rail. Co.*, 19 O. R. 369: *per Rose*, J.).

3. "There are several cases in which the question has been very much discussed as to when a carrier's liability ceases as an insurer, and his liability is changed into that of a warehouseman. Such, for instance, as *Gatliffe* v. *Bourne* (1838), 4 Bing. N. C. 314 and *Cairns* v. *Robins* (1841), 8 M. & W. 258. In the first a fire had taken place after the goods had been put from on board defendant's ship on to a wharf, and the liability of the carrier was held still to continue. In the other, a similar case, there having been delay in the owner, the carrier was still held liable for the loss of the goods as bailee for reward. But I do not think there has been any case decided to this extent, that, because the owner of goods was idle and blameable for leaving them in the carrier's hands, therefore he as bailee held them under no responsibility whatever" (*Mitchell* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256, at p. 260: *Blackburn*, J.).

Railway Cloak Room.

It would seem that railway companies receive goods and warehouse them in their cloak rooms not in their capacity of carriers but as common law bailees. (See *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 75, and *Pratt* v. *South Eastern Rail. Co.*, [1897] 1 Q. B. 718.)

(c) Receipt of Goods by Consignee from the Master of a Vessel.

It is the duty of the consignee to take his goods from the master when the latter has done his part of the unloading. If no time for unloading is specified, the consignee's obligation is to take discharge in a reasonable time. "Reasonable time" depends upon the circumstances which actually exist, provided that these circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee.

1. "It is the duty of the consignee to take his goods from the master when he has done his part of the unloading. No time for unloading being specified, the obligation of the defendants to accept delivery was that which is implied by law; in other words, a reasonable time. But this does not solve the difficulty. The questions still remain—What is a reasonable time? How is it to be ascertained? Is it to be ascertained with reference to what is usual, and can be foreseen and provided for? or with reference to the events which actually happen, whatever they may be? The defendants did all they could under the circumstances which happened. Were they bound to do more? It might be naturally expected that those questions would by this time be clearly settled

one way or other by authority ; but this is by no means the case. The leading decisions are difficult to reconcile, and the opinions of eminent judges are by no means in accord. . . . It appears to me most in accordance with principle to act upon the maxim, '*Lex non cogit ad impossibilia.*' We have to deal with implied obligations, and I am not aware of any case in which an obligation to pay damages is ever cast by implication upon a person for not doing that which is rendered impossible by causes beyond his control. Where no time for unloading is fixed by contract the merchant's obligation is, in my opinion, to use all reasonable diligence under the circumstances which exist at the time of unloading, unless, indeed as in *Hill* v. *Idle* (1815), 4 Camp. 327, and in other cases like it those circumstances are attributable to his own conduct. Unless he has caused the delay, or unless it has been caused by his agents or servants, he is in no default, and the loss to the shipowner must be borne by him, not because he is in fault, but because he is unable to shew any default on the part of the cargo-owner rendering him liable for the delay from which the shipowner has suffered. It sounds reasonable to say that he who has to find labour must take the risk of the labour market ; but this proposition does not solve the difficulty : it leaves out of sight the time within which the labour has to be found. The conclusion at which I have arrived is in harmony with the ordinary course of business ; for there are two well-known forms of contract, one with and the other without a specified number of days for unloading. If the first form is used, the risk of a strike falls on the merchant ; if the second form is used, it does not, and the risk falls on the shipowner, not because he has agreed to bear it, but because he is unable to throw it on the merchant" (*Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626, at pp. 632, 633, 638, 639 : *Lindley*, L.J.).

"*Reasonable Time*" *depends upon the Circumstances that Exist.*

2. "If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them [the respondents who were consignees and holders of the bills of lading], and it would have been no answer to a charge that they had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so. The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable

time. The question is, has the appellant [the shipowner] proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied. . . . My Lords, there appears to me to be no direct authority upon the point. . . . I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon 'the ordinary circumstances' say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable dispatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken by the court below" (*Hick* v. *Raymond and Reid*, [1893] A. C. 22, at pp. 28, 29: Lord *Herschell*, L.C.).

(d) Delivery according to Custom and Usage.

Lightermen—Custom of River Thames.

1. In *Catley* v. *Wintringham* (1792), 1 Peake 150, Lord *Kenyon* held that the custom of the river Thames that lighters were left by the side of the ship till completely loaded, and that the captain of the ship was obliged to watch them during that time, undoubtedly governed the parties in the absence of a special contract limiting the captain's duty, and that the captain could do no act of his own without the consent of the other party.

2. "A custom appears to have been evolved among the persons engaged in importing timber cargoes into the Thames by way of addition to the terms of the written contract. If that custom contradicts the express terms of the charter-party, then it is a bad custom so far as it is sought to apply it to a charterparty in such terms. But, if the custom is consistent with the terms of the charterparty, so that the two may fairly stand together, then the custom must be taken to be incorporated into the written contract, and the court must construe that contract accordingly" (*Aktieselkab Helios* v. *Ekman and Co.*, [1897] 2 Q. B. 83, at p. 87: Lord *Esher*, M.R.). (89)

Delivery according to Usage of a Particular Port.

3. "The general principle seems to be that, where goods are consigned to a particular port, delivery is to be made according to the usage which prevails at that port. For instance, where goods are to be delivered 'at the port of Cardiff,' the shipowner's contract is fulfilled if he delivers them at the particular part of the port where goods of that class are required to be delivered. So, if delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the shipowner's undertaking to deliver at the port, unless there be something in the terms of the contract inconsistent with it" (*Petrococchino* v. *Bott* (1874), L. R. 9 C. P. 355, at pp. 360, 361: *Brett*, J.).

(e) Payment of Freight and Delivery of the Goods are usually Concurrent Acts.

1. "*Shepard* v. *De Bernales* (1811), 13 East 565 shews that the clause in the bill of lading [the consignees paying freight] was introduced for the benefit of the master only, and not for that of the consignor, and consequently the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. In *Christy* v. *Row* (1808), 1 Taunt. 300, the Court of Common Pleas held, that the master was not bound at his peril to insist upon his freight at the time of delivering the goods; but that if he delivered the goods, and could

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(89) "There is certainly a mercantile construction, as distinguished from the literal construction, of mercantile documents, which is given effect to by the courts when the usage or custom of trade has sanctioned the mercantile method of construction. But such usage or custom must be reasonable, and it must not be repugnant to, or inconsistent with the contract" (*Murton* v. *Kingston and Montreal Forwarding Co.*, 32 U. C. C. P. 372: *Wilson*, C.J.).

not afterwards get the freight from the consignee, he might sue the merchant on the charter-party" (*Domett* v. *Beckford* (1833), 5 B. & Ad. 521, at p. 525 : *Patteson*, J.).

2. "Where two acts are to be concurrent, there must be a concurrent readiness on both sides,—on the one to deliver, and on the other to pay. Each party is entitled to see that the other is ready to do his part: and it is for the jury to say which is in default . . . It is clear that where two acts are concurrent, actual performance is not necessary to enable one party to maintain an action; but that it is enough to show a readiness to perform his part. For this the note to *Pordage* v. *Cole*, 1 Wms. Saund. 320 e. 5 is a sufficient authority" (*Paynter* v. *James* (1867), L. R. 2 C. P. 348, at p. 357 : *Montague Smith*, J.).

3. "Under an ordinary bill of lading, the freight would be payable concurrently with the delivery of the goods, which must be within a reasonable time after arrival" (*Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138, at p. 143 : *Keating*, J.).

4. "Freight is ordinarily payable on the arrival and right delivery of the cargo" (*ibid.*, *Montague Smith*, J.).

5. "Under an ordinary bill of lading, the shipowner is not entitled to claim freight unless the goods have arrived and he is ready and willing to deliver them" (*ibid.*, p. 144 : *Brett*, J.). (90)

Ascertainment of Freight by Measurement upon Delivery.

6. "The freight, however, was not payable before delivery, and could only be ascertained by measurement upon delivery. The case, therefore, was one of those in which the payment of the freight and the delivery of the goods are concurrent acts in which, as is shewn by the case of *Paynter* v. *James* (1867), L. R. 2 C. P. 348, all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery, and in which a settlement can hardly be practically effected without some mutual trust and accommodation" (*Miedbrodt* v. *Fitzsimon* (1875), L. R. 6 P. C. 306, at p. 314 : Sir *James W. Colvile* delivering the judgment of the Judicial Committee).

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(90) *Canadian Locomotive Co.* v. *Copeland*, 16 O. A. R. 322.

"There can be no question of the right of the shipowner, in the absence of stipulations which are not contained in this charter-party, to retain his lien, or in other words to retain possession of the goods until the freight is paid. He must be ready and willing to deliver the goods before his claim for freight is complete, but the freight must be paid before he can be required to part with his possession" (*Winchester* v. *Busby*, 16 S. C. R. 353 : *Patterson*, J.).

Destruction of the Merchantable Character of the Goods disentitles the Carrier to receive Freight. (91)

7. "A large part of the cargo, as much as 700 tons, consisted of dates. The vessel [after being in collision and sunk] was raised and taken into dock. The first question to be decided in this case is whether any freight was payable in respect of the dates. If it was, then there was a profit on the charter freight. If none was payable, there was no profit. Whether or not freight was payable on the dates depended upon their condition. The evidence went to shew that they were saturated with sewage and were in a state of fermentation and putrefaction, and were unquestionably unmerchantable as dates. It was indeed suggested that they still retained the appearance of dates; but if by that suggestion was meant that nothing less than total destruction of the goods would disentitle the shipowner to receive his freight, I can only say that that ancient view of the matter, which was put forward in *Cocking* v. *Fraser*, Park on Insurance, 8th Ed. Vol. i. p. 247, cannot be treated as law at the present day. Total destruction is not necessary, destruction of the merchantable character of the goods is sufficient; and, in accordance with the principle recognised in *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266, *Dakin* v. *Oxley* (1864), 15 C. B. (N.S.) 646, and *Duthie* v. *Hilton* (1868), L. R. 4 C. P. 138, I hold that the plaintiffs were not entitled to receive freight in respect of these dates" (*Asfar and Co.* v. *Blundell*, [1895] 2 Q. B. 196, at pp. 200, 201: *Mathew*, J.).

8. "There is a perfectly well known test which has for many years been applied to such cases as the present—that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature

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(91) "I feel it impossible to dispose of this case without adverting to the proved fact that in relation to a portion of the cargo absolutely destroyed by perils of the sea freight insured to the plaintiff was not, and after the disaster could not have been earned by him" (*Wilson* v. *Merchants Marine Insurance Co.*, 3 N. S. R. 81: *Wilkins*, J.).

by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. That test was applied in the present case by the learned judge in the court below, who decided as a fact that the dates had been so deteriorated that they had become something which was not merchantable as dates. If that was so, there was a total loss of the dates" (*Asfar and Co.* v. *Blundell*, [1896] 1 Q. B. 123, at pp. 127, 128: Lord *Esher*, M.R.).

Production of Bill of Lading.

"According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading" (*The Stettin* (1889), 14 P. D. 142, at p. 147: *Butt*, J.).

(f) Non-delivery.

Trover lies for Delivery to a Wrong Person.

"From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person. In *Ross* v. *Johnson* (1772), 5 Burr. 2825 a distinction was taken between misfeasance and nonfeasance, and it was holden that trover would not lie where a carrier had lost goods by a robbery or theft, Lord *Mansfield* and *Aston*, J., considering that a case of mere omission. But in *Youl* v. *Harbottle* (1791), Peake N. P. C. 49, Lord *Kenyon*, referring to *Ross* v. *Johnson*, said, that where the carrier was *actor*, and delivered the goods to a wrong person, he was liable in trover. *Abbott*, C.J., in *Devereux* v. *Barclay* (1819), 2 B. & Ald. 702, took the same distinction between omission and commission, and held the defendant liable for having done an act which he ought not. *Bayley*, J., referred to *Youl* v. *Harbottle*" (*Stephenson* v. *Hart* (1828), 4 Bing. 476, at pp. 482, 483: *Park*, J.). (92)

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(92) "Where any person holding property as carrier, warehouseman, wharfinger, etc., which he knows to belong to one person, and to be subject to his order, voluntarily gives that property to another without the owner's consent, so that the latter is thereby deprived of his dominion over it, it is evidence of conversion to support an action for trover" (*Leslie* v. *Canadian Central Rail. Co.*, 44 U. C. R. 21: *Hagarty*, C.J.; and see *Roach* v. *Canadian Pacific Rail. Co.*, 1 Man. Rep. 158).

Where carriers make a wrongful delivery, owing to a mistake on a connecting line, they are liable (*Grant* v. *Northern Pacific Rail. Co.*, 22 O. R. 645, and 21 O. A. R. 322).

Determination of Contract by Carrier—Cargo-owner's Right to Cargo.

"What is a contract of affreightment? It is a contract that the shipowner will carry the goods from the port of loading to the port of destination, and there deliver them to the cargo-owner upon his paying the freight. The shipowner is not entitled to the payment of freight unless he fulfils his part of the contract, which is to carry the cargo from the port of loading to the port of destination, and there be ready and willing and able to deliver it. Unless he has fulfilled these conditions precedent to his right to freight he is not entitled to freight at all. That being so, if the ship is lost by perils of the sea, and the sailors are either lost too, or are saved, nevertheless, because the cargo has gone to the bottom the shipowner cannot recover any freight. He has not taken the cargo to the port of destination, and there been ready and willing and able to deliver it. Then arises the case which is dealt with in *The Cito* (1881), 7 P. D. 5, where the master and crew of a ship abandon her in mid-ocean, that is to say, go away with the intention of giving up the carrying of the cargo to the port of destination. It was argued in the case of *The Cito* (1881), 7 P. D. 5, that if they did that, that of itself put an end to the contract of affreightment altogether. In the case of *The Cito* it was said, 'No they do not by abandoning the ship put an end to the contract of affreightment absolutely, so that the cargo-owner, who has had nothing to do with the abandonment, or considered whether it was right or justifiable or not, is bound to consider the contract of affreightment at an end.' But it was held that by that abandonment of theirs, the shipowners had done everything on their side to put an end to the contract of affreightment; they had given up the intention to fulfil it, and as far as they could they had given up the power to fulfil it; and that, therefore, gave the cargo-owner a right. What right? It does not put an end to the contract so as to bind him. It leaves him the option of whether he will treat their abandonment, which is a thing done and concluded by them, as putting an end to the contract of affreightment, or whether he will not; that is to say, whether he will insist that the contract is still in existence if they can complete the contract. The judgment went further, for it showed what was the limit of time during which the cargo-owner could exercise that option. The court did not determine whether if the shipowner could get possession of his ship before the cargo-owner had made his election, and brought the cargo in the ship to the end of the voyage, so as to be willing and ready and able to deliver it—it did not determine that he might

not then insist upon the freight. It did not decide that point. But it decided this, that if at any time before he was in that position, viz., when he had got the ship at the port of destination with the cargo in her, ready and willing and able to deliver it—that if at any time before that the cargo-owner exercised his power of election which was given to him, and which the shipowner could not take away, and the cargo-owner manifested his intention to treat the contract of affreightment as at an end, then it is at an end, and the cargo-owner is entitled to say so. He is then entitled to have his cargo as if there were no contract of affreightment with anyone. If, therefore, he could find the ship himself, derelict on the ocean, he could not take the ship as his own ; he would not be obliged to bring her into port, though if he did so he might claim, I suppose, as a salvor ; but he might with his own crew on board a tug, or any other ship sent out, take the cargo as his own cargo and bring it home himself. Then he certainly would not be bound to pay freight. If he found the cargo at an intermediate port, and if nobody had a claim to keep that cargo, the shipowner having abandoned the ship and the contract, the cargo-owner would insist that he had a right to take that cargo away, and there would be nobody to prevent him. He would have a right to take it away, and he would have to pay no freight" (*The Arno* (1895), 8 Asp. M. C. 5, at pp. 6, 7 : Lord *Esher*, M.R.).

Proof of Non-delivery.

The consignee is bound to give some evidence of the non-performance of the carrier's contract. This is done by merely showing non-delivery of the goods.

1. The plaintiff, a linen-draper at Holywell, in Flintshire, had ordered goods from Shrewsbury to be sent by the defendants' stage coach. The consignor of the goods proved the giving the parcel to the defendants' coachman, and that it was directed to the plaintiff, and was worth 15*l*. To shew that it never came to hand, the plaintiff's shopman was called, who did not know of the delivery, but believed it could not have been delivered without his knowledge. The defence set up was, the usual carrier's 5*l*. notice. The shopman of the plaintiff was cross-examined, to show that the plaintiff read the notice in the Chester Chronicle ; but he did not know whether the plaintiff read that paper or not. The consignor admitted, that he read the paper, but never observed the notice.

Hullock, B., considered, that the evidence of non-delivery was sufficient to call on the defendants to prove a delivery by their porter, or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he has done. As to

the proof of notice, that had failed altogether (*Griffiths* v. *Lee* (1823), 1 C. & P. 110, at p. 111). (93)

2. The defendant was the proprietor of a general booking-office; plaintiffs were tailors and left at the defendant's office, and paid twopence for booking, a box of clothes made by them for a customer, and addressed to him. No direction was given as to any particular conveyance; and it did not appear that any desire had been expressed on the subject by the consignee. The box never reached its destination or was accounted for.

"The defendant was not a carrier, but keeper of a booking-office. His contract was, to take care of the box, that it might be delivered to some carrier, to be conveyed to its destination. To shew a breach of that undertaking by the defendant, it should have been proved by direct evidence that the box was taken away while in the booking-office, and lost, or that it was never delivered to any carrier. No such evidence was given. All the proof was, that it did not arrive at its destination: but, in this case, non-delivery to the consignee was not sufficient. The decision in *Griffiths* v. *Lee* (1823), 1 C. & P. 110, is correct, as applied to the case of a carrier but not to that of a book-keeper" (*Gilbart* v. *Dale* (1836), 5 A. & E. 543, at p. 546: *Patteson*, J.).

3. "In the case of a carrier, the law presumes that he will do his duty; and a plaintiff who charges him with the breach of it, must give some evidence of non-performance. The fact, that the goods have not reached the consignee, is such evidence against the carrier, and calls upon him to discharge himself by other proof. So in the case of the keeper of a booking-office: to call on him for an answer to such a charge as the present, some evidence must be given of the non-performance of his undertaking: but that is not done by merely shewing non-delivery of the goods *to the consignee*. Suppose goods were left with a carrier to be taken by him to

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Canadian Cases.

(93) "Then how does the defendant exonerate himself from the first presumption against him [the goods being in the possession of a stranger] arising from this undisputed fact? In the first place, he alleges that he placed the goods in question on the wharf, which he says was all that he was in law bound to do, and that it was the duty of the consignee to seek out his own goods. The answer to this is, in my judgment, plain. The law required the master to give notice to the plaintiffs' agent of the arrival of the goods. The defendant assumes that all the captain had to do was to remain passive, and to let the several consignees select and carry away their respective goods. The authorities cited and many others shew that this was not so, but that the captain was bound to allot, and deliver the cargo to the respective owners, or at least to place them on the wharf properly distributed" (*Ontario Salt Co.* v. *Larkin*, 36 U. C. Q. B. 489: *Strong*, J.).

York, and from thence forwarded to Edinburgh, would it be sufficient, in an action against him for negligence, to shew that the goods did not reach Edinburgh?" (*ibid.*, at p. 547 : *Coleridge*, J.).

4. "The case falls precisely within the principle stated by *Coleridge*, J., in *Gilbart* v. *Dale* (1836), 5 A. & E. 543, at p. 547. The plaintiff was bound to give some evidence of the non-performance of the defendants' contract. It appears that the portmanteau was given to one of the company's porters on the platform of the Midland Railway, to be forwarded by the Bristol and Exeter Railway to Torquay ; and that it never reached its destination. There was no evidence to shew what became of it, —nothing whatever to shew where the fault lay. The judge of the county court was clearly wrong in point of law, in determining that there was evidence of non-performance of their contract on the part of the Midland Railway Company" (*The Midland Rail. Co.* v. *Bromley* (1856), 17 C. B. 372, at p. 381 : *Cresswell*, J.).

(g) Neglect or Refusal by Consignee to Accept Goods, and Carrier's Duty and Expenses thereon. (94)

When the transit is at an end and the consignee neglects or refuses to accept the goods tendered to him, the carrier must conduct himself as a reasonable man would do under the circumstances, and he is entitled to charge for expenses properly incurred in so doing.

A carrier is not bound to inform the consignor of the consignee's refusal to receive the goods. Such a course, however, may be reasonable.

Canadian Cases.

(94) "The principle involved in this case is important as relates to the duty of carriers on the lakes in this province. The simple question is, whether a carrier is justified in landing goods at a wharf and leaving them there, without placing them in charge of any person willing to receive and be responsible for them, because there is no party named in the bill of lading there to accept them, and no one to whom notice of their arrival can be sent . . . . The contention of the defendants in this case is shortly this, that they carried the goods to Thunder Bay, and not being able to find any consignee or person willing to take charge of them, they left them on a public wharf there, and thus discharged themselves of all responsibility. We cannot agree that this was a fulfilment of their duty" (*Close* v. *Beatty*, 28 U. C. C. P. 470 : *Galt*, J., delivering the judgment of the court).

Semble, that where, after enquiry, the consignees or endorsees of a bill of lading cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for the owner (*ibid.* ; and see *Canadian Locomotive Co.* v. *Copeland*, 16 O. A. R. 322).

1. "The true rule is, that when a consignee refuses to accept a parcel tendered to him by a carrier, the carrier must conduct himself as a reasonable man would do with reference to it. I doubt if a consignor has a right to impose on a carrier the burden of doing anything after he has tendered the goods. But assuming that he has, it is sufficient if the carrier does what is reasonable. It was argued that the carrier must inform the consignor if the consignee refuses to receive the parcel: I wholly deny that as a rule of law. There may be cases in which such a course may be reasonable. But in others the consignor may not be known" (*Hudson* v. *Baxendale* (1857), 2 H. & N. 575, at pp. 581, 582: *Bramwell*, B.).

2. "I agree that there is no rule of law binding a carrier, under such circumstances, to give notice to the consignor. No trace of such a doctrine is to be found in the books. No doubt in some cases such a course may be proper" (*ibid.*, at pp. 582, 583: *Watson*, B.).

3. "I dissent from the doctrine propounded by the plaintiffs' counsel that, as a matter of law, a carrier is bound to give notice to the consignor in the event of a refusal by the consignee to accept goods sent to him. There may be cases in which such a course may be proper" (*ibid.*, at p. 583: *Channell*, B.).

4. Defendant sent a horse by the plaintiffs' line from King's Cross to Sandy, consigned to the defendant himself at Sandy, the fare being prepaid. When the horse arrived at Sandy at 10 p.m., there was no one at the station to receive it on behalf of the defendant; by the direction of the station-master, the horse was taken to a livery-stable.

"First, what was the duty of the plaintiffs, as carriers, with regard to the horse? and secondly, if they incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse? Now in my opinion it was the duty of the plaintiffs, as carriers, although the transit of the horse was at an end, to take such reasonable care of the horse as a reasonable owner would take of his own goods; and if they had turned him out on the highway, or allowed him to go loose, they would have been in default. Therefore they did what it was their duty to do. Then comes the question, can they recover any expenses thus incurred against the owner of the horse? As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled. It had been long debated whether a shipowner has such a right, and gradually,

partly by custom and partly by some opinions of authority in this country, the right has come to be established. It was clearly held to exist in the case of *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, at pp. 230—235, where all the authorities on the subject are reviewed with very great care; and that case, with some others, was cited and acted upon by the Privy Council in the recent case of *Cargo Ex Argos* (1873), L. R. 5 P. C. 134. The Privy Council is not a court whose decisions are binding on us sitting here, but it is a court to whose decisions I should certainly on all occasions give great weight, and their judgment on this point is clearly in accordance with reason and justice. It was there (at pp. 164, 165) said (after referring to the observations of Sir James *Mansfield*, C.J., in *Christy* v. *Row* (1808), 1 Taunt. 300), 'The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined.' Then, after citing the cases, the judgment proceeds: 'It results from them that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing.' That seems to me to be a sound rule of law. That the duty is imposed upon the carrier, I do not think anyone has doubted; but if there were that duty without the correlative right, it would be a manifest injustice" (*Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Ex. 132, at pp. 137, 138: *Pollock*, B.). (95)

Canadian Cases.

(95) "It is clear that in the case of a ship, where the time of arrival is uncertain, and where the consignee may not know with any degree of certainty when the vessel may arrive, the duty of the carrier is to give notice" (*Richardson* v. *Canadian Pacific Rail. Co.*, 19 O. R. 374: *Rose*, J.).

SECTION XII.

TITLE OF THIRD PERSON.

A carrier, as a general rule, cannot dispute the title of his customer.

A carrier is protected against the pseudo-owner, in the event of the rightful owner claiming the goods, and their being given up to him.

See also *ante*, p. 91, Chapter II.—Deposit; Section IX.—Title of Third Person to Deposit; and *post*, Section XX.—Stoppage *in transitu*.

1. "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner, before the defendants had parted with the goods. The law would have protected them against the real owner, if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding: and we do not assent to the altered statement of the law in the later editions of Story on Bailments, ss. 266 and 582,—the earlier editions of that valuable work having laid it down in accordance with our view" (*Sheridan* v. *The New Quay Co.* (1858), 4 C. B. (N.S.) 618, at pp. 649, 650: *Willes*, J., delivering the judgment of the court).

2. "*Sheridan* v. *The New Quay Company* (1858), 4 C. B. (N.S.) 618, contains a collection of all the learning on the subject, as to the transfer of rights to goods in the hands of a bailee, and the principle of the judgment is that on which I give mine" (*The European and Australian Royal Mail Co.* v. *The Royal Mail Steam Packet Co.* (1861), 30 L. J. C. P. 247, at p. 253: *Erle*, C.J.).

Eviction by Title Paramount generally Discharges the Carrier from his Promise to Deliver.

3. "In bailments such as that upon which the appellant founds his claim the bailor represents to the bailee that he may safely accept the bailment. On this representation the bailee promises to redeliver. It is clear that the bailee, after acknowledging that he

holds the goods in his hands on account of the bailor, cannot say to the bailor 'The goods are not yours,' but it is equally clear that if there is that which amounts to eviction by title paramount the bailee is discharged from his promise. In that event he is under no liability to the bailor unless he has made a special contract with him or he is in some way to blame for his loss: *Biddle* v. *Bond* (1865), 6 B. & S. 225" (*Ross* v. *Edwards and Co.* (1895), 11 R. 574, at pp. 577, 578: Lord *Macnaghten* delivering the judgment of the Judicial Committee). (96)

Wrongful Seizure by Revenue Officers.

Action for the non-delivery of ten pipes of wine, shipped at the island of Madeira, on board a vessel of which the defendant was owner, to be carried to Jamaica and from thence to England. When the vessel arrived off Jamaica, she was seized with her cargo for a supposed violation of the revenue laws, and there condemned; but upon an appeal to the Privy Council in England, the sentence of condemnation was reversed.

"You [the owner of the ship] have an action against the officers. The shipper can only look to the owner or the master of the ship" (*Gosling* v. *Higgins* (1808), 1 Camp. 451, at p. 452: Lord *Ellenborough*).

Canadian Cases.

(96) "It is certainly true that the defendants, although acknowledged wrongdoers, might to an action for conversion, under the plea that the goods were not the plaintiff's, prove the property in the goods to be in any other person and not in the plaintiff; but no case has been cited to us to show that, to an action like the present, brought by a person in whom the title and property in the goods are, a wrongdoer can resist the right of such owner of the goods converted, to recover, by setting up a right in the nature of a right of stoppage *in transitu* which a third person might have had it in his power to exercise, but did not exercise, of interfering to prevent the vendee of the goods from receiving such actual possession until he should pay a balance of purchase money; nor has any case been cited to show that a person who had received possession of the goods only as storekeeper for the vendor could, without any authority from the vendor, sell the goods and apply the proceeds to his own benefit, although in satisfaction of a debt claimed to be due by the vendor, without subjecting himself to an action by the vendee for wrongfully depriving him of his property" (*Troop* v. *Hart*, 7 S. C. R. 565: *Strong*, J.).

SECTION XIII.

CARRIER'S AGENTS AND SERVANTS.

See also *ante*, p. 364, Section IV.—Common Law Contract of Carriage, (c) Delivery by the Customer to the Carrier; and p. 369, (d) Receipt by Common Carrier of Goods to be Carried beyond the Limits within which he Carries, *ante*, p. 372, Section V. — Duty and Responsibility of Common Carriers; and *ante*, p. 434, Section VII.—The Carriers Act, 1830, notes to section 8; and *ante*, pp. 458, 459, Section VIII.—Railway and Canal Traffic Act, 1854, (i) and (k).

It must be borne in mind that this section will treat only of a carrier's agents and servants in connection with bailments.

Qui per alium facit per seipsum facere videtur (Co. Litt. 258 a).
Respondeat superior (4 Inst. 114).

The carrier is answerable for every such wrong of his agent or servant as is committed in the course of the agency or service and for the carrier's benefit, though no express command or privity of the carrier be proved. The carrier is not answerable for any such wrong of his agent or servant as is not committed in the course of the agency or service and not for the carrier's benefit. (97)

Canadian Cases.

(97) "It has long been settled that a master is liable for the careless and wilful acts of his servant done while he is performing the master's work, and is acting in the course of his service and employment. But that he is not liable if the servant is acting plainly on his own business, or to carry out his own personal objects, and not in his line of duty towards his master" (*Erb* v. *Great Western Rail. Co.*, 42 U. C. Q. B. 96: *Wilson*, J.; and see *Hepenstall* v. *Merritt*, 33 N. B. R. 91, and *Emerson* v. *Niagara Navigation Co.*, 2 O. R. 538).

Fifty barrels of oysters having been shipped at Oswego for Toronto per defendant's vessel the *Junius* and the vessel being obliged to go by stress of weather to Kingston, from which latter port the goods were transhipped to Toronto per the steamer *Oshawa*, where they arrived in an injured condition: —*Held*, that the defendant was the carrier throughout, that is, from Oswego to Toronto viâ Kingston (*McConkey* v. *Gorrie*, 5 U. C. C. P. 430).

Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line but on one connecting therewith, it was held that this was evidence to be submitted to a jury of a

Canadian Cases.

contract to that effect binding the defendants, and that a non-suit was wrong" (*McGill* v. *Grand Trunk Rail. Co.*, 19 O. A. R. 245).

"If a servant be accredited and authorised by his master to act for him in all his business of a particular kind, he will be held to be, with reference to his employment, a general agent, and the public having no means of knowing what are the directions of the principal, the latter will be liable, even though his instructions be disregarded" (*ibid.*, *Burton*, J., at p. 247).

"Where common carriers take into their charge goods directed to a particular place and do not by positive agreement limit their responsibility to their own lines, that is *primâ facie* evidence of an undertaking on their part to carry the goods to the place directed, although the place may be beyond the limits within which they in general profess to carry on their business of carriers" (*ibid.*, *Burton*, J., at p. 246).

Plaintiff delivered a planing machine to defendants to be carried between two stations. In placing it on board a car for that purpose defendants' servants injured the machine by negligence, or want of proper appliances:—*Held*, that defendants were liable notwithstanding the special contract that the machinery was to be carried at owner's risk (*Whitman* v. *Western Counties Rail. Co.*, 5 Russell and Geldert (N.S.) 405; *Grand Trunk Rail. Co.* v. *Fitzgerald*, 5 S. C. R. 204, followed).

Plaintiff purchased a ticket to Washington from defendants. In order to reach Washington, plaintiff had to travel over five different railways. Having lost his trunks through negligence of the servants of one of these railway companies, it was held that the defendants were liable, for the contract was with them to carry the plaintiff and his luggage the entire distance (*Smith* v. *Grand Trunk Rail. Co.*, 35 U. C. Q. B. 547).

A common carrier is liable for the negligence of his servants in taking goods on board his vessel in his absence, though he may have directed them not to receive goods, the plaintiff having no notice of such instructions (*Street* v. *Morrison*, N. B. Reps. 5 All. 296, and see *Burns* v. *Cassells*, 26 N. B. Reps. 20; 14 S. C. R. 256).

When a railway company undertakes to carry goods to a point beyond the terminus of its own line, its contract is for carriage of the goods over the whole transit, and the other companies over whose line they must pass are merely agents of the contracting company. Such a contract being one which a railway company might refuse to enter into, s. 104 of the Railway Act (R. S. C. c. 109), does not prevent it from restricting its liability for negligence as carriers after the goods have left its own line (*Vogel* v. *Grand Trunk Rail. Co.* distinguished) (*McMillan* v. *Grand Trunk Rail. Co.*, 15 O. A. R. 14; 16 S. C. R. 543).

When a through contract is entered into for carriage over several lines by one of several carriers the contracting carrier is liable for negligence (*Merchants Despatch Transportation Co.* v. *Hately*, 14 S. C. R. 572; 12 O. A. R. 201, 640).

When the contract is with one company to carry goods through to the place of destination another company over whose line the goods pass, though receiving a portion of the freight, is not responsible for injury to such goods (*Gordon et al* v. *Great Western Rail. Co.*, 34 U. C. Q. B. 224; see also *Smith* v. *Grand Trunk Rail. Co.*, *post*, p. 559).

Respondeat superior (4 Inst. 114).

Owner liable for Misconduct of Master of Vessel.

1. "The maxim applies here *respondeat superior*. The case is shortly this:—This vessel, belonging to the defendants, trading from Hull to Gainsborough, took on board some goods belonging to the plaintiff, which were to be delivered at Stockwith. The vessel went safe as far as Stockwith, and there delivered part of the cargo; but the master of the vessel finding it inconvenient to deliver the rest there, proceeded on her voyage, and sunk before her arrival at Gainsborough. The defendants [the owners] are called upon to make good the loss that happened to the plaintiff's goods; and as the vessel reached Stockwith in safety, and might have delivered the plaintiff's goods there, I think that this action may be maintained; for though the loss happened in consequence of the misconduct of the defendants' servant, the superiors [the defendants] are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of the voyage" (*Ellis* v. *Turner* (1800), 8 T. R. 531, at p. 533: Lord *Kenyon*, C.J.).

Arrangement between Master and Servant.

2. The defendant and one Dyson were carriers from London to Gosport, and by an arrangement between them Dyson horsed the waggon from London to Farnham, and the defendant then conducted it from Farnham to Gosport, and at the time the mischief happened the waggon was drawn by Dyson's horses, and was driven by a servant of Dyson's, who had been hired by and received wages from Dyson, and with whose employment the defendant had no concern whatsoever, but the waggon itself was the property of the defendant.

"I am of opinion, that the action may be maintained on this principle: the waggon belongs to Elkins, and he receives the profits derived from the use of it; on what terms he engages with Dyson we do not know, but being jointly entitled with Dyson, and since it is no objection that Dyson has not been joined, the case is the same as if Elkins had received all the profits. Then since the waggon was to be drawn for the benefit of Elkins, the servant to all legal purposes was the servant of Elkins, although for inferior purposes; and as between the parties he may be considered as the servant of Dyson, the objection however which has been

made is a fair one, and I regret that a question of so much importance has arisen in so trifling a cause" (*Waland* v. *Elkins* (1816), 1 Stark. 272, at p. 274: *Gibbs*, C.J.).

The next case is taken out of its chronological order, as it is a case of a general servant of one person being at the same time the servant of another, and the principle to be extracted from the cases is there stated.

3. "The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such a case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics or peculiarities of which neither the livery-stable keeper nor his driver have had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him" (*Jones* v. *Scullard*, [1898] 2 Q. B. 565, at p. 574, 575: Lord *Russell*, C.J.).

The Carrier's Servant is not Liable if no Contract is made with such Servant.

4. "It is admitted, that where a carrier's servant loses goods, the action should not be against him, but against the master" (*Cavanagh* v. *Such* (1815), 1 Pr. 328, at p. 337: *Wood*, B.).

5. The plaintiff had sent a watch to be repaired in London, and it was delivered in a parcel to the defendant by the direction of the owner, at the White Horse Cellar, Piccadilly, with directions to deliver it to the plaintiff. The defendant was the driver of the coach and was informed what the contents of the parcel were. The watch was not received by the plaintiff.

"I am of opinion that the defendant was not liable in the capacity of a carrier, and no conversion has been proved to make him liable. I accede to the proposition, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shewn that he had been in the habit of conveying parcels, for hire,

the case would certainly be altered ; but being the mere servant, it cannot be inferred that he took the parcel to be carried for hire and reward without further proof. The only fact is that he was the driver of the coach ; no contract has been proved, there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant" (*Williams* v. *Cranston* (1817), 2 Stark. 82, at p. 84 : Lord *Ellenborough*).

The Carrier is not Liable if Parcels are Sent by his Servant for a Reward to the Latter.

6. "There is no doubt that by law every proprietor of a stage waggon is liable for all risks except those occasioned by God and the King's enemies ; and to make such proprietors answerable, it is not necessary that you should call up Mr. Pickford or any of the other persons who are the owners of those vehicles, and deliver your parcel to them ; but a delivery of the parcel to any of the meanest of their servants is quite sufficient, provided that servant, in receiving parcels, be acting by the authority or with the assent of his master. But it is equally clear, that if persons be foolish enough to send parcels by the waggoner, for a hire paid to him which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost" (*Butler* v. *Basing* (1827), 2 C. & P. 613, at pp. 613, 614 : *Garrow*, B. (in summing up to the jury)). (98)

General Rule.

The Carrier is Answerable for every such Wrong of his Servant or Agent as is Committed in the Course of his Service, and for the Carrier's Benefit, though no Express Command or Privity of the Carrier be Proved. (99)

7. "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express

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Canadian Cases.

(98) "Nothing is clearer, and it is consistent with common sense and justice, that if a person delivers anything to carry to a person on board a boat, not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible" (*M'Leod* v. *Eberts et al*, 7 U. C. Q. B. 247 : *Robinson*, C.J.).

(99) "I think, in the absence of anything to the contrary, we must assume that the conductor is the agent of the defendants' company, authorised by them to do all legal acts for the proper management of the business of collecting the tickets and fares from passengers, preserving order and regulating the running of the trains, and authorised by them, as well as by the Act of

command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of byelaws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the byelaws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (*Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259, at pp. 265, 266: *Willes*, J., delivering the judgment of the court).

A Carrier is not Liable in an Action for Deceit for the Unauthorized and Fraudulent Act of his Agent or Servant, Committed for the Servant's Private Ends.

"There is, so far as I am aware, no precedent in English law, unless it be *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244, a case that was overruled upon appeal [*Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301], for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends. The true rule was, as it seems to me, enunciated by the Exchequer Chamber in a judgment of *Willes*, J., delivered in the case of *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259, 'The general rule,' says

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Canadian Cases.

Parliament, to remove persons from the cars who misconduct themselves or have not paid their fare. This being within the general scope of his authority, if, in assuming to carry out what he is legally empowered to do, and in relation to which he may be considered the general agent of the company, he forcibly removes a passenger from the cars who has paid his fare, without any excuse for so doing, it seems to me he must be liable for the assault, and that the doctrine of *respondeat superior* applies to the defendants" (*Williamson* v. *Grand Trunk Rail. Co.*, 17 U. C. C. P. 616: *Richards*, C.J.; and see also *Coll* v. *Toronto Rail. Co.*, 25 O. A. R. 55).

Willes, J., 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord *Selborne* in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317. *Mackay* v. *Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, is consistent with this principle. It is a definition strictly in accordance with the ruling of *Martin*, B., in *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, which was upheld in the Exchequer Chamber (see *per Blackburn*, J.)" (*British Mutual Banking Co.* v. *Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, at p. 717 : *Bowen*, L.J.). (100)

And see *post*, Section XVI., (h) and (i).

Where Instructions are Given to a Carrier's Agent without the Knowledge of the Carrier, the Latter is not liable for his Agent's Neglect of such Instructions.

"The plaintiff in effect says to the defendants' agents 'Do not in future pursue the ordinary course of business, by delivering the goods on arrival, but keep them until I send you instructions.' The defendants, knowing nothing of this arrangement between the plaintiff and Carver & Co. [the agents] send their goods on in the expectation that Carver & Co. will do their duty. The latter have, it may be, been guilty of negligence in omitting to do something which they were directed by the plaintiff to do, without the knowledge of the defendants. The defendants are clearly not liable for that" (*Butterworth* v. *Brownlow* (1865), 19 C. B. (N.S.) 409, at pp. 415, 416 : *Byles*, J.).

Canadian Cases.

(100) An agent of a carrier has not merely by his employment authority to contract for the carriage of goods by his employer, unless the goods are actually delivered to him (*Monteith* v. *Merchants Despatch Co.*, 1 O. R. 60 ; *Oliver* v. *Great Western Rail. Co.*, 28 U. C. C. P. 143).

"The mere giving a receipt for goods and issuing a bill of lading without any goods having been received was clearly not within the usual scope of the employment of a freight agent. It was only when he had actually received goods to be shipped that the giving a receipt and bill of lading for such goods was within the usual scope of his employment" (*Erb* v. *Great Western Rail. Co.*, 5 S. C. R. 189 : *Ritchie*, C.J.).

"In this case there is no fraud, but in all cases of this kind, whether there be fraud or not, the liability of the defendant as principal must necessarily depend upon the fact of his having authorised the commission of the act complained of" (*Morrison* v. *Fishwick*, 1 Russell and Geldert, 65 : *McDonald*, J.).

Where a Carrier has upon the Spot a Person acting as his Agent, that is Evidence to go to the Jury that that Person has Authority from the Carrier to do all those things on the Carrier's Behalf which are Right and Proper in the Exigencies of the Carrier's Business. If the Agent happens to make a Mistake or commits an Excess while acting within the Scope of his Authority, the Carrier is responsible for it. (101)

1. "There can be no question since the decision of the case of *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672, that where a railway company or any other body (for it does not matter whether it is a railway company or not), have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business,—all such things as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *primâ facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority, his employers are responsible for it" (*Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534, at p. 538: *Blackburn*, J.).

Shipowners' Liability for Acts of their Master. (102)

2. "The master is the general agent of the owner for the purpose of the voyage, and for the exercise of that agency is intrusted with powers, to be used at his discretion, in which the owner who selects him is satisfied to confide. If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, and it turns out that the facts do

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Canadian Cases.

(101) Railway companies are bound by the contracts entered into by their general agents as to the terms and conditions of carrying passengers, although such contracts should, within the means of knowledge of the agent, be beyond the regulations made by the railway company in relation to such matters (*Childs* v. *Great Western Rail. Co.*, 6 U. C. C. P. 284).

(102) In *Melancon* v. *Comeau*, James' Nova Scotia Rep., vol. i., 373, it was *held* that the transfer of the materials of a wrecked vessel by the master, for a purpose outside the scope of his authority, did not change the property in the goods.

"The master of the vessel is for all purposes, within the scope of his authority as such, the agent of the owner, and the latter is bound by his contracts which fall within those limits, but not for such as are beyond them" (*Bliss*, J., *ibid.*), and see *Wood* v. *Stymest*, 10 N. B. R. 309.

not warrant its exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts, according to the rule '*omnia facta magistri debet præstare qui eum præposuit*:' Pothier Louages Maritimes, 48; *Ewbank* v. *Nutting* (1849), 7 C. B. 797; and for a like reason they must be liable for his culpable omissions" (*Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, at p. 236: *Willes*, J., delivering the judgment of the court (*Kelly*, C.B., *Martin*, *Channell* and *Cleasby*, BB., *Willes*, *Byles*, and *Keating*, JJ.)).

A Railway Company's having a Person upon the Spot acting as their Agent is primâ facie Evidence that such Agent has Authority to do what the Exigency of the Case requires.

3. "Where a railway company are carrying on business there are certain things which are necessary to be done for the carrying on of the business, and the protection of the company, and there are things which if done at all must be done at once, and therefore the company must have some person on the spot to do those things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises what shall be done. *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822, which was followed by *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672, laid down the rule that if such person intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible, because he was their agent. *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672, also decides that where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is *primâ facie* evidence that he had authority, and the presumption that he had authority must be rebutted by the company" (*Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36, at pp. 38, 39: *Blackburn*, J.).

4. "The case of *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672, shews that the person in authority on the spot must be taken to have authority to do what the exigency of the case requires" (*Kirkstall Brewery Co.* v. *Furness Rail. Co.* (1874), L. R. 9 Q. B. 468, at pp. 471, 472: *Quain*, J.).

5. "I quote *Jervis*, C.J., in *Giles* v. *Taff Vale Rail. Co.* (1853), 2 E. & B. 822, at pp. 829, 830: 'I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the company with all

cases arising in the course of their traffic as the exigency of the case may demand.' In that case the Chief Justice was dealing with a railway company and with the question whether planting quicks and giving directions in respect of them was an act within the authority of the general superintendent of the line, and it was agreed that the company was a railway company for carrying goods and not a market gardening company for the purpose of planting 'quicks.' But the reply was given in the words which I have quoted, and which I certainly adopt. The Chief Justice continues: 'I think he had authority, in the exigency of the traffic, to keep the quicks in the mode in which they were kept, and that consequently they were in the custody of the company in the course of their ordinary business'" (*Owners of* "*Apollo*" v. *Port Talbot Co.*, [1891] A. C. 499, at pp. 507, 508: Lord *Halsbury*, L.C.).

When a contractor undertakes to do a lawful thing, and the contractor over whom the carrier who employs him has no control, does it by himself or his servants, and is guilty of negligence, the carrier is not responsible.

A carrier is liable for the failure on the part of a contractor employed by him to perform the duty of his employer whether the failure is attributable to negligence or not.

"Where a master employs a servant to do a lawful thing, and the servant is guilty of negligence in the course of doing it, the master is responsible. When a contractor undertakes to do a lawful thing, and the contractor over whom the employer has no control, does it by himself or his servants and is guilty of negligence, the employer is not responsible" (*Welfare* v. *Brighton Rail. Co.* (1869), L. R. 4 Q. B. 693, at p. 698: *Blackburn*, J.).

A man may be the general servant of one person and at the same time be the servant of another in relation to a particular matter. The question is who had the control of the servant in the conduct of such matter.

"That case [*Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205] makes it quite clear that a man may be the general servant of one person, and yet at the same time be the servant of another in relation to a particular matter, and it also shews that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business. The other case is *Donovan* v. *Laing, &c. Syndicate*, [1893] 1 Q. B. 629. There the defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm

or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. It was held that though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. That case is on all fours with *Rourke* v. *White Moss Colliery Co.* (1877), 2 C. P. D. 205" (*Jones* v. *Scullard*, [1898] 2 Q. B. 565, at pp. 573, 574: Lord *Russell*, C.J.).

Running Powers—Negligence.

"A railway company is responsible for the safe conduct of trains and carriages within its own premises, and if a collision between those trains or carriages takes place, there is *primâ facie* a case of negligence against the company who have the control over them. But it is contended that where, as in this case, there are 'running powers' possessed by other companies, there is nothing to shew that the train which did the mischief does not belong to one or other of them. In answer to this argument, however, it may be said that no train can pass over the defendants' line except under some arrangement with them or by their authority, and subject either directly or indirectly to their control. They alone know to whom any particular train belongs; and, moreover, the times and other regulations of its running must be fixed by arrangement with them. And as they are bound to make provision that trains belonging to other companies should come at safe times, and at reasonable speeds, it can only be where their arrangements are insufficient, or are departed from, that there is negligence. But then to exonerate themselves from liability, the railway company ought to shew that the accident has happened not by their default, but in consequence of their arrangements not having been followed" (*Ayles* v. *South Eastern Rail. Co.* (1868), L. R. 3 Ex. 146, at p. 148: *Kelly*, C.B.). (103)

Canadian Cases.

(103) A lumber company had railway sidings laid in their yard, for convenience in shipping lumber, over the line of railway with which the switches connected:—*Held*, that in the absence of any special agreement, the railway company's servants while engaged in bringing away the cars were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in moving the cars (*Canada Atlantic Rail. Co.* v. *Hurdman*, 25 S. C. R. 205).

Hackney Cabs.

Proprietor and Driver of a Hackney Cab are always regarded as Master and Servant.

"The Acts of Parliament referred to [1 & 2 W. 4. c. 22 & 6 & 7 Vict. c. 86] always regard the proprietor and driver of the hackney cab as employer and employed, or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver shall have a remedy against the proprietor . . . . It would be most inconvenient and unjust towards the public if an action, such as the present, brought against one who proclaimed himself to be the actual proprietor of the cab, when it was engaged by the plaintiff, and actually was so, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver, and the proportions in which the earnings of the cab are to be divided between them. On such considerations *Morley* v. *Dunscombe* (1848), 11 L. T. (o.s.) 199 appears to have been decided. This decision is expressly in point; and we think that we ought to abide by it" (*Powles* v. *Hider* (1856), 6 E. & Bl. 207, at pp. 213, 214: Lord *Campbell*, C.J.).

"It seems to me that the decision in *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, interpreted the Act of 1843 (6 & 7 Vict. c. 86) as having this effect—that when the driver of a hackney carriage in London does an act which under the ordinary law would give a right of action against his master, in the ordinary sense of that word, an action can now be maintained against the registered proprietor of the hackney carriage, even although the driver is not according to ordinary law his servant. That, in my opinion, is the meaning of that decision. If, therefore, the driver of a hackney carriage does that which amounts to a breach of contract with a person who hires the carriage—for instance, if he loses his luggage—the owner of the luggage can maintain an action for damages against the registered proprietor of the carriage, although the driver was not his servant. This was decided in *Powles* v. *Hider* (1856), 6 E. & B. 207. The same principle was applied in *Venables* v. *Smith* (1877), 2 Q. B. D. 279, to an action against the registered proprietor of a cab for personal injury caused to one of the public by the negligence of the driver. These two cases and *King* v. *Spurr* (1881), 8 Q. B. D. 104, were considered by this court in *King* v. *London Improved Cab Co.* (1889), 23 Q. B. D. 281, and we had then to determine whether we would adopt the ruling in *Powles* v. *Hider* and *Venables* v. *Smith* in its full sense. It appears to me that this court did there adopt the ruling in those cases in its full sense, and held that the true interpretation of the Act is that which I have already stated" (*Keen* v. *Henry*, [1894] 1 Q. B. 292, at pp. 293, 294: Lord *Esher*, M.R.).

See also *ante*, p. 215, Chapter VII.—Hire of Goods and Chattels; Section III.—(c) Cabdrivers and Cab Proprietors.

Collateral Negligence.

"I will take the law, however, as it was laid down by Lord *Blackburn* in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at p. 829. Lord *Blackburn* there said 'Ever since *Quarman* v. *Burnett* (1840), 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; *Pickard* v. *Smith* (1850), 10 C. B. (N.S.) 470; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314.' Lord *Blackburn* in this passage contrasts a contractor's negligence, which he calls 'collateral' with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. Lord *Blackburn's* language in *Hughes* v. *Percival* (1883), 8 App. Cas. 443, at p. 446, shews that this is really what he meant, for he points out that the employer's duty was to see that his contractor did his work properly. Lord *Watson* [at p. 449] said the same thing" (*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, at pp. 341, 342: *Lindley*, L.J. [followed by *The Snark*, [1899] P. 74]). (104)

Canadian Cases.

(104) "In this case it must be observed the defendant merely employed the contractor to repair the house, and he never authorised or contemplated the taking out the brestsummer, the negligence in removing which caused the injury. . . . He could, therefore, in no sense be said to have given any order for its removal. Its removal, therefore, was a matter wholly collateral to his order to make repairs, and arose incidentally in the mode of the performance by the contractor of the simple order he had received, namely, to do all necessary repairs in a proper and workmanlike manner. . . . In that case, therefore, in accordance with the principle in other cases, it was necessary to inquire whether the relation of master and servant existed, and it being held it did not, the defendant was held not to be liable" (*McMillan* v. *Walker*, 21 N. B. R. 47: *Weldon*, J.; see also *Campbell* v. *McGregor*, 29 N. B. R. 644: judgment of *Tuck*, J.).

SECTION XIV.

PASSENGERS.

(a) *Passenger's Contract with Carrier*, p. 540.

(b) *Duty of Carrier to Passengers imposed by Law*, p. 545.

(c) *Special Contracts*, p. 557.

(d) *Byelaws and Regulations must not be Unreasonable in any Particular* p. 563.

(e) *Punctuality of Carrier*, p. 570.

(f) *Lien*, p. 571.

(a) Passenger's Contract with Carrier.

The contract between a passenger and a carrier is that, on the passenger paying the fare for the journey, the carrier will carry him in his vehicle or vessel on the journey, or voyage for which he has so paid the fare, using due care for his safety while so doing. Such contract may be subject to conditions by reason of notice given to that effect by advertisement, or upon the ticket or other document incorporating such conditions. (105)

Canadian Cases.

(105) "The plaintiff has, no doubt, sustained a serious injury, for which he should be recompensed, if the cause of that injury can be attributed to the defendant. The evidence shows that the defendant did engage to carry the plaintiff as a passenger in the defendant's vessel from Toronto to Niagara; the obligation upon the defendant, therefore, was to carry the plaintiff safely and securely, and to land him safely and securely at his destination" (*Cameron* v. *Milloy*, 14 U. C. C. P. 346: *Wilson*, J.).

The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "Good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catherine's, an intermediate station, and defendants refused to let him go on from thence by the night express:—*Held*, that they were justified in doing so; that defendants' contract bound them to convey the plaintiff in one continuous journey from Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to be conveyed the residue in some other train—the whole journey to be completed within twenty days; but that it did not give the right to stop at any or every intermediate station (*Craig* v. *G. W. Rail. Co.*, 24 U. C. Q. B. 504).

The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford *viâ* Galt and Berlin. There was a break in the line of the defendants' railway at Galt, the distance between the stations being three-fourths of a mile. An omnibus was provided, as advertised by the defendants, but the plaintiff was asked to pay a fare of ten cents for transfer

See also *ante*, p. 389, Section VI.—Restriction of Carrier's Obligations and Liability by Public Notice or Special Contract.

Canadian Cases.

in it, and, refusing to do so, was not permitted to be transported free. He failed to make his connection and brought an action for damages. It was *held* that he was entitled to be conveyed from station to station free of expense (*Clarry* v. *Grand Trunk Rail. Co.*, 29 O. R. 18).

"The next question is whether or not the plaintiff had a right to get on the train at the time it was started. She held a ticket that entitled her to travel by the first-class car on this train. Under this contract the carrier was bound to provide reasonable facility and opportunity to get on board during a reasonable time before and up to the time when the carrier was entitled to start the train within his contract; and the plaintiff would be entitled to the whole of such time to exercise her right of getting aboard, and was not bound to get on at one time during such period rather than at any other time during such period" (*Hall* v. *McFadden*, 21 N. B. R. 599: *King*, J.).

"At the time when the plaintiff was thus led reasonably to believe that he might safely go ashore, the boat was not close to the floats, and it was after dark, and no precautions were taken by defendants to guard against this unusual danger known to and created by them, but not known to plaintiff, and the result was that the plaintiff (without any want of care on his part so far as appears) fell between the boat and the floats and was injured. I think there is, in all this, evidence of neglect and breach of duty, whether the duty be regarded as that of giving reasonable means of landing in safety or the more general obligation to exercise reasonable care towards those whose charge is assumed in the act of carriage, or whether it be the still more general duty of taking reasonable precautions in the management of that which without such care is likely to cause injury to others in the exercise of their rights" (*MacDonald* v. *Mayor of St. John*, 24 N. B. R. 373: *King*, J.).

The defendant corporation owned and operated a public ferry between Halifax and Dartmouth. Plaintiff was a resident of Dartmouth, and in returning to her house, after dark, by one of the defendants' boats, in attempting to land from the boat on the Dartmouth side, fell into a gap between the boat and the float or landing stage and was severely injured. The steamer was wound up close to the float on the south side, but on the north side there was a gap caused by wind and tide. Plaintiff was near sighted and mistook this for a difference in level between the deck of the steamer and the float. There was a bar on the steamer to prevent passengers from leaving before the boat was properly secured. This had been removed, and the other passengers had gone on shore before the plaintiff attempted to leave the steamer. It was *held* that the defendants were guilty of negligence in not taking greater precautions for the safety of passengers on the occasion when the accident occurred (*Drake* v. *Dartmouth*, 25 N. S. R. 177).

"It might be argued with the same show of reason that one who is short sighted should abstain from travelling the public highways unless attended, or without taking extraordinary and unusual precautions. Any argument of that kind leaves out the duty incumbent on the defendant to keep the public highways reasonably safe for travel, and more especially in the case of a landing place for those travelling on their steamer; and if there are dangerous places, their duty is to give timely warning" (*Townshend*, J.: *ibid.*).

Contract Gathered from a Ticket and an Advertisement.

1. "The whole question is what was the contract between the parties? The company state in their ticket and in their advertisement, from which we are to gather what the contract was, that a person taking a ticket may return by the trains advertised for that purpose on any day not beyond 14 days after the date thereof. Certain trains were advertised. The party had no right to go by any other train; but it seems to me that he had a right to decide by which of those trains he would go, and on what day; or he would have been under the necessity of presenting himself at the station every day, and then, perhaps be told that the train was full" (*Great Northern Rail. Co.* v. *Hawcroft* (1852), 21 L. J. Q. B. 178, at p. 182: *Wightman*, J.).

Ticket issued "Subject to the Conditions contained in a Railway Company's Time Tables and Advertisements." (106)

2. "The contract between the plaintiff and the defendants really is that, on his paying the fare for the journey, they will carry him in their carriage on the journey, for which he has so paid the fare, using due care for his safety while so doing. That contract may

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Canadian Cases.

(106) Railway Act, 51 Vict. (D), ch. 29. *Robertson* v. *Grand Trunk Rail. Co.*, 24 O. R. 75, allows proof of a special contract limiting damages where negligence is proved. But the decision in this case is based on the estoppel created by plaintiff having, in the contract, valued his horse at 100 dols., which was the amount at which loss was limited in the contract. See *Cobban* v. *Canadian Pacific Rail. Co.*, 26 O. R. 761, and *Vogel* v. *Grand Trunk Rail. Co.*, 11 S. C. R. 612. This latter case has settled the law to be that, in the cases whatever they may be to which s. 246 applies, it prevents the company relieving itself by special contract from all liability for damage arising from negligence.

While a contract for complete immunity from the consequences of negligence is held to be against the Railway Act, 1888 (D), s. 246, yet a fair and reasonable provision limiting the measure of damages to be the declared and agreed on value of the article, may be lawfully entered into, the price of transport being proportioned to such fixed value. "I do not see any objection to parties who are contracting for the carriage, or bailment, or hiring of chattels, agreeing that such chattels shall be considered as of a named value" (*Robertson* v. *Grand Trunk Rail. Co.*, 21 O. A. R. 208: *Hagarty*, C.J.O.).

"The argument mainly relied on before us was that the conditions endorsed on the ticket were not binding on the plaintiff, and that, therefore, the defendant was subject to the ordinary liability of a common carrier, but the authorities are clear that a reference on the face of the ticket to the conditions endorsed on the back is a compliance with the statute" (*Wood* v. *Allan*, 1 Russell and Geldert, 483: *Weatherbe*, J.).

The statute referred to is 18 & 19 Vict. c. 119, Imp. Stat. s. 71. On a second trial there was a verdict for the plaintiff on the ground of negligence, and the verdict was upheld (3 Russell and Geldert, 211).

be subject to conditions by reason of notice given to that effect upon the ticket incorporating such conditions. In this case it is said that the ticket referred to certain conditions and thereby incorporated them into the contract. The only conditions which can be alleged to be so incorporated into this contract are the by-laws and regulations which the company made in pursuance of the authority given them for that purpose by statute. They can only make by-laws and regulations in pursuance of their statutory powers, and accordingly we find that they assume to make certain by-laws and regulations as required under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), viz., under the seal of the company and with the approval of the Board of Trade, and such regulations are the only conditions which can be looked on as incorporated by reference by this ticket" (*Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, at p. 211: Lord *Esher*, M.R.).

A Passenger by Railway has no Easement over the Carrier's Premises.

"In this case the plaintiff, who was a passenger by the defendants' railway, had paid for a ticket, but had lost it. At a certain stage of the journey he was asked to produce his ticket, and, not being able to do so, was told that he must pay the ordinary third class fare from Manchester to Sheffield. He refused to do so; and thereupon the defendants' servants assumed the power of pulling the plaintiff forcibly out of the railway carriage in which he was travelling. The plaintiff brings an action of assault against the defendants for this act of their servants; and the defendants assert they were justified in removing the plaintiff from their carriage by force, using no more force than was necessary for the purpose of overcoming his resistance. The defendants put it that the plaintiff was unlawfully upon their premises. . . . I do not think that is made out. What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me, a contractual relation. It was alleged that the contract was for a right to go on the defendants' land in the nature of an easement, but that, there being no grant of an easement under seal, there was only a licence given by the defendants to go on their premises, which they could revoke. All I will say with regard to that contention is that, though it may have been quite right for the defendants' counsel to suggest the point, it seems to me when considered to be contrary to good sense. To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places seems to me really ridiculous; and the absurdity of such a view of the case becomes

greater when we remember that companies often contract to convey passengers over the lines of other companies. It seems to me, therefore, that the considerations upon which the case of *Wood* v. *Leadbitter* (1845), 13 M. & W. 838 turned are not applicable to this case" (*Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, at pp. 210, 211: Lord *Esher*, M.R.).

"The plaintiff had taken his ticket, and the effect was that there was a contract by the company to carry him to Manchester and back. There is no authority as yet to the effect that such a contract of carriage is a contract for an interest in land. It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to treat the case as one of a revocable licence. It is a case of a contract for carriage. The doctrine of *Wood* v. *Leadbitter* (1845), 13 M. & W. 838 does not appear to me to be at all applicable to the case of such a contract" (*ibid.*, at p. 213: *Lindley*, L.J.).

A Railway Company does not Dedicate its Premises to the Public, nor is it bound to allow Carriers of intending Passengers to enter their Premises. (107)

"This action [by an omnibus proprietor who carried passengers and their luggage for hire to and from the railway station for refusing to allow him to drive his vehicle into the station yard] is founded upon a supposed duty on the part of the defendants to permit the plaintiff to come upon their land,—a duty which is alleged to arise from their allowing the public generally to do so. It is not alleged that there has been any dedication of this place to the public: but it is said that it is the duty of a carrier to allow persons who bring passengers or goods to be carried, to enter his premises for the purpose of delivering there the passengers or the goods. It certainly would be somewhat extraordinary if any such right could exist in one to whom the company owes no direct duty, but who merely brings to the station

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Canadian Cases.

(107) A railway company is bound to provide for passengers safe means of ingress to and egress from its stations, and where a passenger arriving at a station at night, walked along a platform not intended but frequently used as a means of exit, but which was not in any way guarded, and after leaving the platform, fell into an excavation in the company's grounds and was injured, the company was held liable in damages (*Oldwright* v. *Grand Trunk Rail. Co.*, 22 O. A. R. 286). "The learned judge told the jury 'The Company is bound as to its passengers to see that their premises are in such a condition in all respects that a person in the exercise of ordinary care may leave them without injury.' That is the liability which exists on railway companies with regard to persons getting off their trains" (*Hagarty*, C. J. O., *ibid.*).

the individuals with whom the company contracts. The case of *Pickford* v. *The Grand Junction Rail. Co.* (1841), 8 M. & W. 372 shews that this correlative duty between the contracting parties is essential to the maintenance of an action against a common carrier for refusing to carry. There is another ground also upon which this action is not maintainable: An action will not lie at the suit of A. for the breach by B. of a duty which he owes to C. I remember a case where a stage-coach passenger brought an action against the builder of the coach for an injury sustained by him from a defect in the vehicle. And the answer was, that an action would only lie as between the parties between whom the contract was made" (*Barker* v. *The Midland Rail. Co.* (1856), 18 C. B. 46, at p. 59: *Willes*, J.).

See also *ante*, p. 446, Section VIII.—Railway and Canal Traffic Act, 1854; (d) Railway stations, and the quotation from the case of *Perth General Station Committee* v. *Ross*, [1897] A. C. 479, at p. 483: Lord *Halsbury*, L.C.

Contract with one Company to carry Passengers beyond their Line.

"We are of opinion that there was but one contract, and that that contract was with the South Wales Railway Company, and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Railway Company, they conveyed on their line passengers booked from Newport to Birmingham. We think that the principle of *Muschamp* v. *The Lancaster and Preston Junction Rail. Co.* (1841), 8 M. & W. 421 applies to this case; and as there was no contract with the Midland Railway Company the plaintiff fails in this action" (*Mytton* v. *Midland Rail. Co.* (1859), 4 H. & N. 615, at pp. 621, 622: *Martin*, B.).

See also *ante*, p. 369, Section IV.—Common Law Contract of Carriage; (d) Receipt by Common Carrier of Goods to be Carried beyond the Limits within which he Carries, and *post*, p. 557, (c) Special Contracts.

(b) Duty of Carrier to Passengers imposed by Law.

(See also *ante*, p. 351, Section III. — Roadworthiness and Seaworthiness.) (107a)

A carrier does not warrant or insure the safety of a passenger. He undertakes to take due care (including in that term the use of skill and foresight) to carry a passenger safely.

Canadian Cases.

(107a) As to Seaworthiness, see *post*, p. 677.

The above rule is gathered from and illustrated by the following cases :— (108)

Mail Coaches.

The Proprietors of Mail Coaches, if they carry Passengers, are bound to Carry them Safely and Properly.

1. Action against the defendants, who were proprietors of the Chester *mail* coach, for the negligence of the driver, by reason whereof the coach was overturned, and the plaintiff's arm broken.

The plaintiff proved his case. *Mingay*, for the defendants, said that he was told a case of Harris and Wilson had been tried before Lord *Loughborough* at the Common Pleas Sittings after Easter term last, in which his lordship had held that the proprietors of a mail coach were not answerable for the negligence of their servants ; saying that those coaches were not under the government of the proprietors, but the concern of the public, being

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Canadian Cases.

(108) "In this case it seems to me that the utmost care and skill were exercised which prudent men are accustomed to use under similar circumstances. The road was examined by a proper person from time to time and within twenty minutes of the time of the accident, and found to be in good order, and more than this I do not think the law exacts from carriers of passengers for hire. . . . I do not at all wish to be understood as impugning the position that, in every contract for the conveyance of passengers by rail, there is an implied undertaking for the safe condition of the road, as well as the vehicle, so far as the carriers can insure it by the utmost care and diligence" (*Canadian Pacific Rail. Co.* v. *Chalifoux*, 22 S. C. R. 725 : Sir *W. J. Ritchie*, C.J.).

The conductor of a passenger train owes to a passenger a duty to exercise reasonable care notwithstanding that the passenger's contract is with the company, and he may be liable to a passenger for a breach of such duty (*Hall* v. *McFadden*, 21 N. B. R. 586). "A carrier who in fact performs the act of carriage is liable to the passenger for injuries received by him through the neglect of such carrier, although no contract for carriage, either express or implied, exists between such carrier and the passenger, and although such carrier is simply performing the carriage by arrangement with another carrier with whom the passenger has a contract of carriage. . . . Now it seems to me that the following circumstances (supposing them to exist) are sufficient to raise a duty of care and caution by the person having control of the starting of a railway train towards one having a right of passage by it, and entirely irrespective of contract, viz., the control of such an instrument of danger, the right of the passenger to get aboard, the knowledge or reasonable means of knowledge of the person having control of the train that the passenger is present and seeking to exercise his right, and the knowledge or the reasonable means of knowledge by such person that the probable consequences of starting the train too soon or without ordinary precautions will be to put the passenger in peril and possible danger of his life in exercising his rights" (*King*, J. : *ibid.*, at pp. 596, 598. See also *McAdam* v. *Ross*, 22 N. S. R. 264).

established merely for the conveyance of letters ; and therefore if any person travelled in them, he went at his own risk, and the law implied no promise for his safety.

Lord *Kenyon* said he was certain that no such determination had ever been made by Lord *Loughborough*. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century, whether the postmaster-general was liable for letters sent. [See *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646, and *ante*, pp. 342, 343.] He would not deliver any opinion on that point, as it had nothing to do with the present case ; for when these coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly (*White* v. *Boulton* (1791), 1 Peake 113).

This case would doubtless govern that of a *mail* train should such a point be taken with regard to it.

Stage-Coach.

Usual Place for Setting Down—Driver bound to Inform Passenger of Danger.

2. The plaintiff was carried safely as an outside passenger on the top of the coach, to the Cross Keys at Chelsea, where it stopped. When arrived before the gateway of this inn, leading to the stable-yard, the coachman requested her to alight there, as the passage into the yard was *very awkward*. She said, as the road was dirty, she would rather be driven into the yard. He then advised her to stoop, and drove on. The consequence was that she was struck violently on the shoulders and back by a low archway in the passage, and received a personal injury of which she was not likely to recover.

"The defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down. (109) As coach-owner, therefore he was answerable for the negligent acts of his servant, till the plaintiff was set down at the usual place for passengers alighting at Chelsea. This appears, for the inside passengers at least, to have been the yard. If the coachman had said to her, 'the others will be safe in proceeding, but you must go down here, as you cannot remain upon the coach without

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Canadian Cases.

(109) A steamboat owner who departs from the ordinary and proper method of landing passengers is responsible for the increased danger of the method he adopts (*Cameron* v. *Milloy*, 14 U. C. C. P. 340).

danger to your life,' she could only have blamed her own imprudence for what followed. But he should have given her the materials to judge, if he was to leave her to make her election. He told her the passage was *awkward*; whereas, according to the evidence, it was impracticable" (*Dudley* v. *Smith* (1808), 1 Camp. 167, at p. 169: Lord *Ellenborough*).

Duty imposed by Law to use Due and Proper Care and Skill.

3. "The allegation that it was the duty of the company to use due and proper care and skill in conveying [an officer of the post-office] is admitted. That duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes: if they are bound to carry, they are bound to carry safely; it is not sufficient for them to bring merely the dead body to the end of the journey. They must exercise a reasonable care in performing the duty which is cast upon them by the Act [The Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98)]" (*Collett* v. *London and North Western Rail. Co.* (1851), 16 Q. B. 984, at p. 989: Lord *Campbell*, C.J.).

Distinction between Trains for Passengers, and for Goods or Cattle, as to Efforts to Forward.

4. "There is a distinction between trains for passengers and for goods or cattle. The owners of goods or cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle or goods. The rates of carriage are different, and the cattle or goods sent by goods train pay at a lower rate than they would if sent by passenger trains" (*Briddon* v. *The Great Northern Rail. Co.* (1858), 28 L. J. Ex. 51, at p. 52: *Pollock*, C.B.).

Broad Distinction between the Liabilities of Common Carriers of Goods and of Passengers—Latent and Patent Defects—Due Care explained. (110)

5. "We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty

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Canadian Cases.

(110) "It seems to me the common law liability of the carrier is to continue until a reasonable time after the arrival of the goods and notice to the consignee. There is a clear distinction between luggage and freight. In the former the passenger has notice of the arrival. In that respect the consignee stands on a different footing as to fact, and I find as to principle" (*Richardson* v. *Canadian Pacific Rail. Co.*, 19 O. R. 377: *Rose*, J.).

and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract. . . . The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. . . . There is not only the plain distinction between the liabilities of carriers of goods and of passengers, constantly referred to by text writers and judges as well known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston* v. *Heaven* (1797), 2 Esp. 533, which was the case of an injury to a passenger, *Eyre*, C.J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the King's enemies, and the reasons for it, says, 'I am of opinion the cases of the loss of goods by carriers and the present are totally unlike' [at p. 534]. Again, 'There is no such rule in the case of the carriage of the persons: this action stands on the ground of negligence alone' [at p. 535]. In *Christie* v. *Griggs* (1809), 2 Camp. 79, Sir *James Mansfield* says [at p. 81] 'There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance.' In *Crofts* v. *Waterhouse* (1825), 3 Bing. 319, the observations attributable to *Best*, C.J., clearly shew that he did not think that there was any warranty on the part of the carrier of passengers, and *Park*, J., in the same case says [at p. 321], 'A carrier of goods is liable in all events . . . a carrier of passengers is only liable for negligence.' But besides the observations of individual judges to shew what has hitherto been understood to be the law, there is the series of important cases involving costly and protracted trials, in which by common cor[illegible]t, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

"In *Grote* v. *Chester and Holyhead Rail. Co.* (1848), 2 Ex. 251, where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. *Parke*, B., said [at p. 254]: 'It seems to me that they [the company] would

still be liable for the accident unless he (the engineer) also used due and reasonable care and employed proper materials in the work.' There is no trace in the report that it ever occurred to the court to suppose there was any warranty of the safety of the bridge. In a case tried before *Erle*, C.J., *Ford* v. *London and South Western Rail. Co.* (1862), 2 F. & F. 730, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender. *Erle*, C.J., in his direction told the jury [at p. 732], 'The action is grounded on negligence. Negligence is not to be *defined*, because it involves some inquiry as to the *degree* of care required, and that is the degree which the jury think is *reasonably* to be required from the parties, considering all the circumstances. The railway company is bound to take *reasonable* care; to use the *best precautions in known practical use* for securing the safety and convenience of their passengers.' There the defect was in the tyre of a wheel of the tender of the train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made throughout the case.

"But a case still more directly bearing upon the present point was tried before *Cockburn*, C.J.: *Stokes* v. *Eastern Counties Rail. Co.* (1860), 2 F. & F. 691. There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke from a latent flaw in the welding. The trial last six days, and the questions mainly were whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying [at p. 693]: 'The question is, whether the breaking of the tyre resulted from any negligence in the defendants or their servants, for which they are responsible?' The latent defect in the tyre was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tyre was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied, and there the learned Chief Justice, and the parties themselves, seem to have been utterly unconscious of the contract which was really existing, if the

plaintiff in this case is right; for the warranty, as an obligation implied by law, must have existed at the time of these trials, if it exists now; and surely it is strong to shew that no such rule does form part of the common law that it was not then recognized and declared.

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"It seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive to be fair and right, have been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote* v. *Chester and Holyhead Rail. Co.* (1848), 2 Ex. 251. 'Due care' however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected" (*Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, at pp. 381, 382, 388, 389, 390, 392, 393: *Montague Smith*, J., delivering the judgment of the Court of Exchequer Chamber (*Kelly*, C.B., *Byles*, *Keating*, and *M. Smith*, JJ., *Channell* and *Bramwell*, BB.). (111)

Canadian Cases.

(111) "In this action by a passenger on board defendants' steamer from Halifax for Liverpool, plaintiff seeks to recover damages for delay in crossing the Atlantic in pursuance of his business by reason of the loss of the rudder which, it was contended, was owing to want of due care in undertaking the voyage in a defective steamer. I understand the law now to be that the defendants were bound to provide a steamer reasonably fit for the voyage, and that they are not liable for defects which no care could have detected" (*Neal* v. *Allan et al*, 6 Russell and Geldert (N.S.) 452: *Weatherbe*, J.).

Carriers not Liable for Damage to Passengers which Arises Solely and Exclusively from the Act of Others.

6. "The defendants undertook to carry the plaintiff from Leeds to Sheffield. While he was performing the journey, upon their own line, there being no negligence of any sort upon their part, either as owners of the line, or carriers, or otherwise, the train of the London and North Western Company, through the negligence of the servants of that company, ran into the defendants' train, and so injured the plaintiff. The act that did the damage was solely and exclusively the act of the North Western Company. Now why, under those circumstances, should the defendants be liable? If this had been the case of goods they would have been liable, because they are then insurers; but here the duty of the defendants, according to the decided cases, is this: they enter into a contract that all persons connected with the carrying and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen. But they contract no further. If they were to contract that everybody should use care and diligence, their duty would extend to strangers. But it is conceded that they have no such duty as that. They have no contract or duty that strangers to the railway (if one may use such an expression) shall do nothing wrong either by wilfulness or negligence" (*Wright* v. *Midland Rail. Co.* (1873), L. R. 8 Ex. 137, at pp. 140, 141: *Bramwell*, B.).

"The first thing is to find out what is the contract between the parties, and, unfortunately, the distinction between the duty of a carrier in the carriage of goods and the carriage of passengers was for many years not clearly laid down in this country. In America it had been considered, and the decisions were tolerably clear upon it. But in *Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412; (1869), L. R. 4 Q. B. 379 the whole law was thoughtfully considered and carefully laid down, shewing that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in the providing materials, engines, carriages and so on, for the passage of the passengers. That being so, there is no difficulty whatever in applying the rule where the railway company's line is all their own" (*ibid.*, at p. 146: *Pollock*, B.).

Carriers Bound to Take all Reasonable Precautions.

Carriers of passengers are bound to see that every thing under their own control is in full and complete and proper order. They are bound to take all reasonable precautions and care with reference

to any danger which may reasonably be expected upon the line of road over which they travel or with reference to any certain and definite risk as to which they have any knowledge or can reasonably be supposed to have any knowledge ; but they are not answerable for any mischief occasioned by any matter extraneous altogether to the work in which they are engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care.

Reasonable Precautions to be Taken Against a Known Unusual Danger to Passengers.

1. "This was an action by a passenger on the Metropolitan Railway for an injury sustained by him from the falling of an iron girder on to the roof of the carriage in which he was travelling ; and he seeks to charge the company with liability by reason of negligence. I agree entirely with the counsel for the defendants that it is not enough for the plaintiff to shew that there has been an accident upon their line, and thence to argue that therefore the company are liable even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to : and I go further, and say that the plaintiff should also shew with reasonable certainty what particular precaution should have been taken. It is not necessary in this case to draw a distinction between railway companies and other carriers of passengers, or to lay down any rule beyond this, that, if the company know that there is unusual danger from work which is in progress on or over the line, and have it in their power to avert the consequences of that danger by the use of reasonable precaution, they are bound to adopt that precaution, and, not doing so, they are guilty of a breach of duty" (*Daniel* v. *The Metropolitan Rail. Co.* (1868), L. R. 3 C. P. 216, at pp. 222, 223 : *Willes*, J.).

2. "There has been a case put by one of the learned Judges in the Court of Common Pleas—Mr. Justice Willes—which very aptly illustrates what would be the reasonable duty of a company, like a railway company carrying passengers for hire. He gives [see the case in the court below, L. R. 3 C. P., at p. 223] the case of a waggon heavily laden with goods, piled up to that enormous height to which we often see waggons piled up in this metropolis —that waggon passing along the road, and the goods being so improperly packed that a bale of goods falls upon a stage-coach

and kills or injures a passenger. In that case the learned Judge was of opinion that the stage-coach proprietor would not be responsible; and I apprehend that the groundwork of that opinion is, that those who undertake the carriage of passengers are bound to take all reasonable precaution and care with reference to any danger which may reasonably be expected upon the line of road over which they travel. An instance of that kind is given in an authority which has been cited before us [*Birkett* v. *Whitehaven Junction Rail. Co.* (1859), 4 H. & N. 730] — namely, an accident accruing from switches on a line of railway not being found in their proper place, and those switches not being on the line of railway which is the property of the company which is conveying the passengers, but forming part of a line over which the company has contracted to convey the passengers. They would be obliged to see that their own line of road was in perfect order, and they would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to carry passengers over that particular piece of road; but they would not be answerable, as I apprehend, for any mischief occasioned by any matter extraneous altogether to the work in which they were engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care. Going back to the case of the waggon, I cannot understand why, if Mr. Justice Willes was of that opinion, he should not have considered the stage-coach proprietor in that instance equally liable for the goods falling off the waggon upon his passengers with the railway company in this instance; because, if we ask the question, whether there is not more danger in passing a waggon so laden than in passing over an ordinary public road under ordinary circumstances, that question must be answered in the affirmative. Anybody driving along a road, and seeing a waggon thus heavily laden, (the possibility of which being insufficiently packed must, of course, occur to any mind, its very appearance being alarming to those who pass, who must know that there is a risk—a possibility of accident,) would be bound, according to the doctrine which has been held in this case, to drive on the other side of the road, or to wait till the waggon has gone in some other direction, and he would be guilty of negligence in passing by that waggon, the risk attending the passing of which must be a greater risk than the risk of passing along an ordinary line of road. I apprehend that all that is to be done by those who carry passengers for hire is that they are bound to see that everything under their own control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk

as to which they have any knowledge or can reasonably be supposed to have any knowledge, that it is sufficiently guarded against. For instance, a trench may be dug across a road through no fault of theirs, and in such a case they could not be held to be liable; but if there is any reasonable ground for apprehending that extraordinary precaution is wanted, they would be liable. But in a case in which a work is being carried on by competent and intelligent persons accustomed to the business, and in respect to which the evidence is simply this—that although the work may be considered dangerous, the workmen employed in it have never known an accident before this time, and where the particular accident which has occurred was occasioned by a change from the cautious mode of doing the work hitherto pursued to a more incautious mode of doing it, (I do not wish to prejudge a case which may be pending in other courts against another company)—to hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident, to an extent beyond anything that has been laid down in any case with which I am acquainted, and which, indeed, common sense would not warrant" (*Daniel* v. *The Metropolitan Rail. Co.* (1871), L. R. 5 H. L. 45, at pp. 54, 55, 56: Lord *Hatherley*, L.C.).

Duty as to Examination of Foreign Trucks by a Railway Company.

3. "A coal truck belonging to the Birmingham Waggon Company, but which had been let to a colliery company, came on to the defendants' line at Peterborough. The defendants are compelled by statute to forward foreign traffic, *i.e.* through traffic, from other lines. It seems to me that the railway company are bound to take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state as to travel safely. They must therefore use diligence in the examination of such trucks, and the question is whether, on the facts in this case, that obligation was discharged" (*Richardson* v. *Great Eastern Rail. Co.* (1876), 1 C. P. D. 342, at p. 343: *Jessel*, M.R.).

Passenger with Unknown Peculiarity. (112)

4. "What is the duty of a railway company to its passengers? It arises out of the contract, and must be determined upon the

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Canadian Cases.

(112) *Drake* v. *Dartmouth*, 25 N. S. R. 177. Judgment of *Townshend*, J., *ante*, p. 541.

facts known to the contracting parties at the time of the contract. Ordinarily it is the duty of a carrier of passengers arising out of the contract of carriage to carry the passenger upon the contracted journey with due care and diligence, and to afford him reasonable accommodation in that behalf. If the carrier omits to perform either of these duties, he is responsible for the ordinary consequences arising to the ordinary passenger therefrom. There is no duty in these circumstances to take extraordinary care of a passenger by reason of any unknown peculiarity then attaching to him [viz., one who had incurred the ill-will of pitmen in the neighbourhood in which he was travelling]" (*Pounder* v. *North Eastern Rail. Co.*, [1892] 1 Q. B. 385, at p. 388 : A. L. *Smith*, J.).

See also *Cobb* v. *Great Western Rail. Co.*, [1894] A. C. 419, where it was held that it is not the duty of a railway company to a passenger on their line to stop their train for the arrest and search of persons charged with robbery by the passenger.

Coach Passenger placed in Danger jumping off.

"To enable the plaintiff to sustain the action (on the case), it is not necessary that he should have been thrown off the coach ; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril ; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation" (*Jones* v. *Boyce* (1816), 1 Stark. 493, at p. 495 : Lord *Ellenborough*).

Evidence of Negligence.

Primâ Facie Evidence of Negligence.

"There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it" (*The Great Western Rail. Co. of Canada* v. *Braid* (1863), 1 Moore P. C. Cas. (N.S.) 101, at p. 116 : Lord *Chelmsford*, delivering the judgment of the Judicial Committee).

Reasonable Evidence that Accident arose from Want of Proper Care.

"Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care" (*Scott* v. *London Dock Co.* (1865), 3 H. & C. 596, at p. 601: *Erle*, C.J.).

[Quoted in *Burke* v. *The Manchester, Sheffield and Lincolnshire Rail. Co.* (1870), 18 W. R. 694, by *Bovill*, C.J.]

(c) Special Contracts.

A carrier ordinarily undertakes with regard to passengers to take reasonable care that the former's premises shall be in such a state as not to expose the passenger using them to undue or unreasonable danger. It is otherwise, however, if the passenger, by special contract, travels at his own risk.

A Passenger being Carried at his own Risk excludes all Liability for Negligence on the Part of the Carrier.

1. "The terms of the agreement under which the plaintiff became a passenger exclude everything for which the company would have been otherwise liable. They would have been liable for nothing but negligence, and they would have been liable for negligence whether gross or of a minor degree; and so far, under ordinary circumstances, the passenger would have been carried at their risk. But it was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable" (*McCawley* v. *Furness Rail. Co.* (1872), L. R. 8 Q. B. 57, at p. 59: *Cockburn*, C.J.). (113)

Canadian Cases.

(113) The defendants, who were carriers by water of passengers and goods, made a special contract with the Commercial Travellers' Association, by which members were entitled to a reduced rate of fare and 300 pounds of baggage free, the latter to be at the owner's risk against all casualties:—*Held*, that the terms of the conditions protected the defendants from all liability for negligence (*Dixon* v. *Richelieu Navigation Co.*, 15 O. A. R. 647, and 18 S. C. R. 704). "It seems conceded that the words 'owner's risk' alone would protect the carriers against all but wilful neglect, or misconduct, or unreasonable delay; and there can be no pretence that the words 'against all casualties' were ever used with the intention of destroying the protection of the simple words, 'owner's risk' (*ibid.*, *Hagarty*, C.J.O.). The words 'against all casualties' must, I think, be held, and were intended to extend the meaning of the term 'at owner's risk' to all possible contingencies other than wilful misconduct" (*ibid.*, *Burton*, J.A.).

The Principle Explained.

2. "It must be taken to be the fact that the plaintiff was travelling on the defendants' railway gratis, and on the terms that it should be at his own risk, and the question reserved was, whether the fact that the plaintiff was travelling at his own risk exempted the company from liability for that which would have been negligence as against an ordinary passenger. The principle on which the company would be liable in such a case is stated in *Parnaby* v. *Lancaster Canal Co.* (1839), 11 A. & E. 223, and has since been acted on in numerous cases. A person, who invites another to come on his premises, undertakes with regard to that person a duty to take reasonable care that the premises on which he invites the person to come, the approach to the premises, as well as the exit, shall be in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger. That is the implied engagement of the company to any passenger who comes on the premises. Whether there would be any such implied engagement towards a person who was invited to come on premises without any payment of money or towards a volunteer we need not inquire. There is such an implied engagement to a passenger, because such implied engagement and duty is part of their contract with the passenger. But here the stipulation of the company is 'We will take you free, provided you travel at your own risk.' That certainly seems to me to amount to this: 'We claim that we shall be free from liability for the negligence of our servants, and also that we shall be free from the consequences of those incidental risks, both before and after the actual transitus, arising from the state of the premises.' I think the decision of the majority of the court in *Hodgman* v. *West Midland Rail. Co.* (1864), 5 B. & S. 173, goes to this extent, because it was there held that the limitation of the value to 50*l.* under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31 s. 2) extended to an accident happening to a horse while yet in the hands of the plaintiff's servant, in leading it into the yard of the defendant company. Their liability was limited, notwithstanding that the mischief happening to the horse in consequence of the yard not being kept reasonably safe for persons coming with horses into the yard, with the intention of having them carried by the railway. *Carr* v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Ex. 707, the case which led to the passing of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), is also a strong authority in favour of the defendants. In that case the horse was killed by the gross and culpable negligence of the driver of another train, a servant of the company, and if the horse had been the property of

a stranger, or even if it had been trespassing on the railway and could not get out of the way of the coming train, the company would have been liable ; yet the Court of Exchequer held that, as there was a stipulation in the contract of carriage that the horse should be carried at the risk of the person sending it, they must give judgment for the defendants, leaving it to the legislature, if they thought fit, to alter the law; an appeal which the legislature very soon answered by the passing of the Railway and Canal Traffic Act" (*Gallin* v. *London and North Western Rail. Co.* (1875), L. R. 10 Q. B. 212, at pp. 215, 216 : *Blackburn*, J.).

See also *ante*, p. 369, Section IV.—Common Law Contract of Carriage, (d) Receipt by Common Carrier of Goods to be Carried beyond the Limits within which he Carries.

Passengers Contracting with one Railway Company only for a Journey, partly over its Line and partly over other Lines.

(i.) A railway company issuing a ticket to a passenger for a journey partly on the company's own line and partly on the line of another company may be, and presumably is, responsible for the safety of the passenger on his whole journey and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations, to whichever company they belong.

(ii.) A railway company may under certain circumstances be subject, in favour of a passenger upon such a journey as last-mentioned, to similar responsibilities, although as between the company and the individual passenger there may have been no contract, *e.g.*, a servant travelling with his master, or a child with its parent.

(iii.) Carriers may be liable for injuries received by a passenger when carried by them, although no contract for carriage may exist between the carriers and the passenger or any person contracting directly for his carriage.

The above propositions of law were established by the cases next referred to.

Passenger conveyed on a Line belonging to a Company other than the Contracting Company. (114)

1. "I feel bound to add for myself and on behalf of several of the judges who have taken part in the hearing of this case, that,

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(114) The plaintiff purchased a ticket from defendants at Detroit for a first-class passage from Detroit to Washington, paying the fare for the whole distance. It had five coupons attached, perforated so that they could be

independently of the decision of *Great Western Rail. Co.* v. *Blake* (1862), 7 H. & N. 987, where a railway company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon every principle of the law, a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other" (*Thomas* v. *Rhymney Rail. Co.* (1871), L. R. 6 Q. B. 266, at p. 273: *Kelly*, C.B.)

2. "When you get a case where the passenger, in order to get to his destination, has to go over other lines, over which the defendants' company may have running powers, or which, by some other contract, they may have the right to use, then an apparent difficulty arises. It is quite clear upon principle, and now upon authority, that the utmost extent to which the railway company, who are the defendants and the first contracting parties, may be made liable, is for due diligence and care and the due provision of proper materials, fixed or locomotive—that is, engines, rails, carriages, and all the necessary appliances for the carriage of the passenger upon the lines in respect of which the contract arose; and this makes it quite immaterial whether it is the case of several

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Canadian Cases.

detached and given up, each one being for the distance to be traversed over a different railway or omnibus route on the way. The plaintiff's trunk was checked to Buffalo, and, when near that place, a person took his check for it, with the coupon for the omnibus route to the station of the Erie Railway, by which the plaintiff was to proceed, and gave him an omnibus check across the city of Buffalo in return. The conductor of defendants' train, being asked by the plaintiff, told him it was right to give his check to this person. The omnibus line was paid by the Erie Railway Company. The trunk having been lost owing to the neglect of the omnibus agent,—*held* that the defendants were liable, for the contract was with them, to carry the plaintiff and his luggage the entire distance (*Martin L. Smith* v. *Grand Trunk Rail. Co.*, 35 U. C. Q. B. 547).

"When a company sells a ticket to a passenger to a point on connecting lines, and receives the full fare for passing over all the lines, and no conditions limiting the liability are contained on the ticket, or any other instrument binding the passenger, it seems to us that is evidence of a contract, and that a jury, in the absence of anything to repel such inference, may fairly say that the company undertakes to carry the passenger and his luggage safely, as much over the connecting lines as they do over their own" (*Richards*, C.J., *ibid.*).

railway companies, or a case in which the passenger is carried by different means of locomotion. Such was one of the cases cited by Mr. Field, of *John* v. *Bacon* (1870), L. R. 5 C. P. 437, where the accident arose at Milford Haven, by reason of the hatchway upon a hulk being out of order. Such is constantly the case. It is so, for example, in the case of a journey from London to Kingstown, which is partly by railway, partly by steamer. There can be no doubt that, in all those instances, the first contracting company would be liable. But there you must stop. If you do not stop there, it is impossible to say in respect of whose contract you would seek to make the defendants liable. Their liability would extend to the acts of all persons using the railroad" (*Wright* v. *Midland Rail. Co.* (1873), L. R. 8 Ex. 137, at pp. 146, 147 : *Pollock*, B.).

Journey partly on one Line, and partly on Another—Contract with one Line only—Responsibilities not directly founded on Contract.

3. "There are certain admitted propositions of law to be borne in mind. First, a railway company issuing a ticket to a passenger for a journey partly on the company's own line and partly on the line of another company may be, and presumably is, responsible for the safety of the passenger on his whole journey, and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations, to whichever company they belong : *Great Western Rail. Co.* v. *Blake* (1862), 7 H. & N. 987, at p. 991 ; *Thomas* v. *Rhymney Rail. Co.* (1870), L. R. 5 Q. B. 226, in Ex. Ch. (1871), 6 Q. B. 266. Secondly, a railway company may under certain circumstances be subject, in favour of a passenger upon such a journey as last-mentioned, to similar responsibilities, although as between the company and the individual passenger there may have been no contract ; as, for instance, in the case of a servant travelling with his master upon a ticket taken by the latter : *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655 ; or of a child of tender years travelling upon a ticket taken by its parent, and even in the case of a child above the age within which the company holds itself out as willing to carry children gratis, but taken by the mother without a ticket : *Austin* v. *Great Western Rail. Co.* (1867), L. R. 2 Q. B. 442. The ground upon which these further responsibilities of railway companies are rested is either that stated by Lord *Blackburn*, then *Blackburn*, J., in the last cited case, pp. 445, 446, where he says : 'I think that what was said in the case

of *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely' ; or it is that to which *Lush* and *Shee*, JJ., in the same case inclined, namely, a contract, although not a contract with the individual injured and suing. Whichever ground be taken, the responsibilities are not directly founded upon contract. But, thirdly, the responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which a carrier may be liable for injuries received by a passenger when carried by him, although no contract for carriage may exist between the carrier and the passenger or any person contracting directly for his carriage ; in *Dalyell* v. *Tyrer* (1858), 28 L. J. Q. B. 52, the plaintiff had made a contract with a public ferryman under which the latter was bound to carry him daily for a certain period : the ferryman being unable, upon a particular day, to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement by the crew of a rope, the owner of the boat and crew was held liable to him. So, again, a case of *Reynolds* v. *North Eastern Rail. Co.* (1868) (mentioned in Roscoe's Nisi Prius, 14th ed., p. 591 [16 ed., p. 735]) decided that where a passenger took a ticket of company A. for a journey over the lines of companies A., B., and C., and a collision having occurred on the B. railway by reason of the train in which the plaintiff was running into trucks negligently left on the line, the B. company were liable to the plaintiff in the action of negligence. . . . I think that the true principle in such a case as the present is that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is under the same obligations in reference to the security of the passenger, as it would have been if it had directly contracted with him. This principle is a reasonable one, for underlying it is the fact that more or less directly or indirectly the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety ?" (*Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157, at pp. 168, 169, 170, 171 : *Thesiger*, L.J.). (115)

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(115) *MacDonald* v. *Mayor of St. John*, 25 N. B. Rep. 318.

(d) Byelaws and Regulations must not be Unreasonable in any Particular.

A Penalty (for Refusing to Produce a Ticket) of Paying the Fare from the Station from which the Train originally Started is Unreasonable.

1. "Now it is settled law, not only that it is essential to the validity of a by-law that it be reasonable (Com. Dig. Bye-law, C 6); but also that, 'a bye-law being entire, if it be unreasonable in any particular, shall be void for the whole' (*ibid.* C 7), of which Comyns gives us as an instance—'as, if the penalty be unreasonable.' Here the penalty, that of paying the fare from the station from which the train originally started, cannot under certain circumstances be otherwise than unreasonable. For where crimes are the same, and the criminality equal, equality of punishment is of the essence of penal legislation and justice. Here, the offence being the same, and the criminality equal, whether the offence occurs at one end of the line or the other, the degree of punishment is made to depend on whether the offence has been committed at the one end or the other, its severity increasing as we advance towards the *terminus ad quem*. To illustrate this position. Let us suppose a line of sixty miles in length, with stations at every ten miles. The man who, having travelled to the station next to that from which the train started, refuses to produce his ticket, will have to pay the precise fare for the distance he has travelled, in other words, will not have to pay any penalty at all. The man who does the corresponding thing at the further end of the line, that is to say, who travels the last ten miles of the distance, and then fails to produce his ticket, has to pay, in addition to the proper fare for the distance he has travelled, the fare due to the fifty miles over which he has not travelled, as a penalty, while, as we have just seen, the offender at the other end of the line pays no penalty at all. And the same thing occurs—though of course the disproportion is not so striking—in all the other instances which may happen, according to whether the offence occurred nearer to or farther from the *terminus a quo*. The injustice arising from a law operating thus unequally, and so much more heavily when the offence has been committed at the one end of the line than when it occurs at the other, is too manifest to admit of such a by-law being held to be reasonable.

"It is not a sufficient answer to say that it is 'reasonable that facility should be thus afforded to the company to protect themselves against persons travelling without having taken tickets, it being in most instances impossible for the company, or their

officers, to know [how?] far a person may have travelled.' Facility is not to be afforded to a prosecutor, or his convenience consulted, at the expense of injustice committed in the inequality of punishment. Besides which the company may to a great extent protect itself by greater care in seeing that no person is admitted into their carriages without showing a ticket" (*Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456, at pp. 463, 464: *Cockburn*, C.J.).

Season Ticket—Journey Ticket.

That every passenger shall show and deliver up his ticket (whether a journey or season ticket or otherwise) to any duly authorised servant of the company, whenever required to do so for any purpose is an unreasonable byelaw.

2. "The clause which precedes the penal clause seems to me equally objectionable; the passenger is not only required to show his ticket when demanded, a requisition which is perfectly reasonable and which may be enforced by a reasonable penalty, but he is requested to 'deliver it up,' whatever the purpose may be for which it is demanded, and without any limitation as to the time at which the demand is made. A season ticket is a contract by which the company engages to carry the holder, free of any further charge, for a specified period between certain specified stations. Until that period has expired the holder is entitled to retain the ticket as his own property. He is bound to show it when required, in order that the company's servant may see that it is still in force, and that it entitles the owner to be where he is. The by-law would in terms justify the company in demanding it back on the first journey which the holder makes under it, though it be on the very day the ticket was purchased. The same objection applies to a journey ticket. The holder of such a ticket is entitled to keep it till he has arrived at the station where the tickets for such a journey are collected" (*ibid.*, at p. 466: *Lush*, J.).

The Remedy for Refusing to Pay on Non-production of Ticket is by Action and not Eviction.

3. One of the byelaws and regulations of the defendants was that "Every passenger shall shew and deliver up his ticket to any duly authorised servant of the company when required to do so for any purpose; and any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey."

"I do not think it is necessary for the purposes of this case to discuss the question whether that [*supra*] is a valid or reasonable regulation, or how far the plaintiff would be bound by it if unreasonable. It would seem, if the decision in *Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456, be correct, not to be reasonable. Whenever it becomes necessary we must deal with that question, but I think we may for the present purpose assume that the condition is reasonable. The effect of it is that the passenger is under an obligation to shew his ticket, when asked to do so, and, if he fails to do so, a certain consequence is to follow, viz., that he must pay the fare from the station whence the train started. But suppose that he refuses to do so, he no doubt breaks his contract; but does it result that the company's servants may lay hands on him and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that, if he fails to shew a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him and put him out of the carriage by force? No one has any right to lay hands forcibly on a man in the absence of some legal authority to do so or some agreement to that effect. It is argued that such a right on the part of the company must be implied, but no court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties, and I cannot agree with the learned judge in the court below in holding that such a term should be implied" (*Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, at pp. 211, 212: Lord *Esher*, M.R.).

Railway Passenger Refusing to Quit Carriage.

THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845 (8 & 9 VICT. c. 20).

Section 103. If any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings. (116)

Canadian Cases.

(116) It was held by the Supreme Court, reversing the decision of the Court of Appeal, Ontario, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used, implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for

Section 104. If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law.

Railway Passenger to Produce and deliver up Ticket if Requested. Travelling without Paying Fare.

THE REGULATION OF RAILWAYS ACT, 1889 (52 & 53 VICT. c. 57). (117)

Section 5.—(1.) Every passenger by a railway shall, on request by an officer or servant of a railway company, either produce, and if so requested deliver up, a ticket showing that his fare is paid, or pay his fare from the place whence he started, *or give the officer or*

Canadian Cases.

refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment.

"This case has proceeded in the courts below upon the authority of *Butler* v. *Manchester and Sheffield Rail. Co.*, which case has no application in the circumstances of the present case. Judgments of the courts in England upon cases arising there, upon statutes wholly different in terms from the statutes of the Dominion of Canada affecting the same subject-matter cannot have any binding effect upon the courts in this country in cases arising upon the statutes in force here" (*Beaver* v. *Grand Trunk Rail. Co.*, 22 S. C. R. 501 : *Gwynne*, J.).

A condition in a railway ticket as to travelling "*vid* direct line" was rejected as meaningless, each of three possible routes being circuitous, though one was shorter in point of mileage than the others. The plaintiff being ejected from the train by order of the conductor while taking one of the longer routes, brought an action for damages, and a verdict in his favour was upheld by the Court of Appeal (*Dancy* v. *Grand Trunk Rail. Co.*, 19 O. A. R. 664).

"I do not find that our courts have yet gone so far as to hold that a passenger rightfully travelling upon his ticket is bound to leave the train at the conductor's order at the peril of not being able to recover damages for an assault committed in expelling him by force. He is in the right, and the company is in the wrong. No one has the right to lay hands forcibly on a man in the absence of some legal authority to do so, and here there was none (*Osler*, J.A., *ibid.*).

(117) Every passenger who refuses to pay his fare may, by the conductor of the train, and the train servants of the company, be put out of the train, with his baggage, at any usual stopping place, or near any dwelling-house, as the conductor elects, the conductor first stopping the train, and using no unnecessary force (Railway Act, 1888, s. 248).

servant his name and address; and in case of default shall be liable on summary conviction to a fine not exceeding forty shillings.

(2.) If a passenger having failed either to produce, or if requested to deliver up, a ticket showing that his fare is paid, or to pay his fare, refuses, on request by an officer or servant of a railway company, to give his name and address, any officer of the company or any constable may detain him until he can be conveniently brought before some justice or otherwise discharged by due course of law.

(3.) If any person—

(*a.*) Travels or attempts to travel on a railway without having previously paid his fare, and *with intent to avoid payment thereof;* or

(*b.*) Having paid his fare for a certain distance, knowingly and wilfully proceeds by train beyond that distance without previously paying the additional fare for the additional distance, and *with intent to avoid payment thereof;* or

(*c.*) Having failed to pay his fare, gives in reply to a request by an officer of a railway company *a false name or address,*

he shall be liable on summary conviction to a fine not exceeding forty shillings, or in the case of a second or subsequent offence, either to a fine not exceeding twenty pounds, or in the discretion of the court to imprisonment for a term not exceeding one month.

(4.) The liability of an offender to punishment under this section shall not prejudice the recovery of any fare payable by him.

Passenger Ticket to bear on its Face the Fare.

THE REGULATION OF RAILWAYS ACT, 1889

(52 & 53 VICT. c. 57).

Section 6. From and after a date to be fixed by order of the Board of Trade, and subject to such exceptions, if any, as may be allowed by such order, every passenger ticket issued by any railway company in the United Kingdom shall bear upon its face, printed or written in legible characters, the fare chargeable for the journey for which such ticket is issued, and any railway company issuing any passenger ticket in contravention of the provisions of this section shall be liable to a penalty not exceeding forty shillings for every ticket so issued, to be recovered on summary conviction.

THE TRAMWAYS ACT, 1870

(33 & 34 Vict. c. 78).

Passenger Avoiding or Attempting to Avoid Payment.

Section 51. If any person travelling or having travelled in any carriage or any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, every such person shall, for every such offence, be liable to a penalty not exceeding forty shillings.

Section 52. It shall be lawful for any officer or servant of the promoters or lessees of any tramway, *and all persons called by him to his assistance*, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he be otherwise discharged by due course of law.

Passenger not Showing Ticket.

1. By the appellants' byelaws under the Tramways Act, 1870, and duly allowed by the Board of Trade, "Each passenger shall show his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company, and shall also when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger." "Any person offending against or committing any breach of these byelaws and regulations shall be liable to a penalty not exceeding 40*s*."

A copy of the byelaws was exhibited on a panel of the car on which the respondent was riding.

"A gentleman travelling on the tram-car inadvertently loses his ticket. It is not found that he had no money to pay his fare over again, but when he is asked to do so he refuses. If he was unable to do so—if, for instance, he had had his pocket picked, and had lost both his ticket and his money—I should feel extremely reluctant to say that in such a case he had incurred the penalty. So, too, if he had given up his ticket to one inspector and thus was unable to give it up when it was asked for a second time, I should not be inclined to hold that the byelaw had been infringed. But that is not the case here. The ticket had been lost (inadvertently no doubt—there is no suggestion of fraud), and the passenger

refuses when requested to pay the fare. In such a case *Heap* v. *Day* (1886), 51 J. P. 213 [that the passenger should be convicted] does apply" (*Hanks* v. *Bridgman*, [1896] 1 Q. B. 253, at pp. 254, 255: *Lindley*, L.J.).

2. In this case the byelaw was in the following terms:—

"Each passenger shall shew his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company, and shall also when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger."

"I agree with the counsel for the respondent that this is really two byelaws—one relating to the production of the ticket, and the other to its delivery by the passenger. The second part of the byelaw has been before the court and has been held to be valid and reasonable in *Heap* v. *Day* (1886), 51 J. P. 213, and by this court in *Hanks* v. *Bridgman*, [1896] 1 Q. B. 253; but I think the first part, as to the production, has not as yet received judicial construction. The strongest argument against it seems to me to be that it may be said that the legislature did not intend to give power to tramway companies to impose penalties on passengers in order to enable the companies to check the conduct of their own servants. But that is the very argument that was put forward in *Heap* v. *Day*, and was there overruled by Lord *Coleridge* and Lord *Bowen*. That decision is binding upon us, and it clearly disposes of that point. Then it is said that the byelaw is unreasonable, because it does not give a passenger who is unable to produce his ticket the option of paying the fare instead. I think it is quite clear that the words 'or pay the fare' in the latter part of the byelaw only relate to the words which immediately precede them—'either deliver up his ticket,' and that they do not apply to the case of a ticket not being shewn. But I do not think that the hardship that is complained of arises, because to my mind the words 'if any' are very important. If the passenger has a ticket he has to shew it, and if he does not do so he is subject to a penalty; but if he has not got a ticket, or if he has lost it, that part of the byelaw does not apply. That is the reason I think that the alternative words allowing payment of the fare in lieu of delivering up the ticket are to be found in the second half of the byelaw, and not in the first. They are not needed in the first half, because if a passenger has a ticket he must shew it when he is asked to do so; but if he has lost the ticket he cannot be fined for not shewing it. I can see no reason why a person who has a ticket and refuses to shew it should not be subjected to a penalty. Indeed in the case of *Saunders* v. *South Eastern Rail. Co.* (1880), 5 Q. B. D. 456, at p. 466, *Lush*, J., expressly says that such a provision is

a reasonable one" [see *ante*, p. 564] (*Lowe* v. *Volp*, [1896] 1 Q. B. 256, at pp. 258, 259 : *Lindley*, L.J.).

(e) Punctuality of Carrier. (118)

It is the duty of a carrier to use due and proper care with the view of insuring punctuality. If a carrier neglects to be reasonably punctual, the passenger may incur reasonable expense in performing the carrier's contract for him.

1. "The company say in their rules and regulations, 'Every exertion will be used to insure punctuality, but the arrival or departure of trains at the time stated will not be guaranteed.' The company very properly decline to guarantee the time of the arrival or departure of trains, because there may be accidents or other matters which render punctuality impossible. It is, however, the duty of the company to use due and proper care with the view of insuring punctuality" (*Prevost* v. *Great Eastern Rail. Co.* (1865), 13 L. T. (N.S.) 20, at p. 21 : *Crompton*, J.).

Want of Punctuality—Passenger taking Special Train—Measure of Damages.

2. "As to damages, we think that the rule attributed to *Alderson*, B., in *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408 ; 26 L. J. Ex. 20, at p. 22, is a good expression of the law. We think it may properly be said that, if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing. The same rule is laid down by *Blackburn*, J., in the case of *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111 ; 44 L. J. Q. B. 49, at p. 52, who says : 'The general rule is that the damages to be recovered in an action for the breach of contract to supply something are the difference between that which should have been supplied and the cost of obtaining something equally good, or, if that is not attainable, of the best substitute.' We think that in this case there was evidence upon which the county court judge might not unreasonably find, and has in effect found, that the plaintiff was not reasonably called upon to wait at York for the late train, and might reasonably take the special train to Scarborough, being for such a distance at such a price ; and therefore we think that the county court judge was justified in law in holding that the plaintiff might charge the defendants with the cost of the special train.

Canadian Cases.

(118) Railway Act, 1888, s. 263.

"We do not say that, in every case of a passenger missing a train in correspondence with that in which he is, though he miss it by the default of the company's servants, he is therefore entitled immediately to take a special train for any distance at any cost, or that a judge or jury would be bound to allow in every case, or justified in allowing in every case, for the cost of a special train. The question must always be whether it was a reasonable thing to do, having regard to all the circumstances. Where to take a special train is a reasonable thing to do, we are of opinion that it is a sufficiently natural result of the breach of contract to bring it within the legal rule" (*Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C. P. D. 286, at pp. 302, 303: *Brett*, J., delivering the judgment of the court (*Brett*, *Denman* and *Lindley*, JJ.)).

3. "One mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company" (*ibid.*, at p. 313, *Mellish*, L.J., cited in *Millen* v. *Brasch* (1881), 8 Q. B. D. 35, at p. 38: *Lopes*, J.).

(f) Lien.

A carrier has no lien on the passenger himself for the clothes he is actually wearing. See, *post*, next Section XV.—Passengers' Luggage, (e) Lien on Luggage. (118a)

Canadian Cases.

(118a) "Railway companies are bound to have proper accommodation for passengers on their line, and to take good care of them while they are in their charge. If any injury is caused to a passenger for want of accommodation or want of care, it is deemed negligence on their part, and they are liable for the damages occasioned thereby" (*McGinney* v. *Canadian Pacific Rail. Co.*, 7 Manitoba L. R. 153: *Dubuc*, J.).

A contract was made by a railway company for carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants. It was held that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence (*Hall* v. *North-Eastern Rail. Co.* applied. *Bicknell* v. *G. T. Rail. Co.*, 26 O. A. R. 431.)

The Steamboat Inspection Act, R. S. C., 1886, ch. 78, provides for the safety of passengers travelling by steamboats.

SECTION XV.

PASSENGERS' LUGGAGE.

(a) *The Contract*, p. 572.

(b) *Definition of Passengers' Luggage and of Merchandise*, p. 577.

(c) *Passenger having the Custody and Control of his Luggage*, p. 586.

(d) *Servants' Luggage*, p. 593.

(e) *Lien on Luggage*, p. 593.

(a) The Contract.

Where a passenger pays a certain sum to the carrier for the carriage of himself and his luggage, his *luggage* is carried for reward, and the liability of the carrier in respect of such luggage is, generally speaking, that of carriers of goods as distinguished from that of carriers of passengers. Compare this with the innkeeper's custody of his guest's goods, *ante*, pp. 294, 301, 302, Chapter X.—Innkeepers, Section II.

The Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), seems to apply to passengers' luggage, if it includes any of the enumerated articles. See Section VII., *ante*, p. 415.

Section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict c. 31) [see the section set out in Section VIII. (i), *ante*, p. 458], applies to passengers' luggage, as also does s. 28 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25, which was substituted for s. 16, par. 2 of the Railway Regulation Act, 1868 (31 & 32 Vict. c. 119). (119)

Canadian Cases.

(119) "The law is clearly and well established that if a passenger carries merchandise as personal luggage, the carrier will not be liable for its loss" (*per Smith*, J., delivering the judgment of the court in *Hamilton* v. *Anglo-French Steamship Company*, 2 Russell and Chesley, 352). See also cases on p. 577.

"It is the duty of a railway company in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and receive it within a reasonable time. If he does not so call for, and receive it, it is the company's duty to put it in their baggage-room, and keep it for him, being liable only as warehousemen. There can be no doubt also that, if the defendant company had become merely warehousemen of the goods for the plaintiff, the destruction of the property by fire in the warehouse without any negligence or fault of the defendant is

1. "I think that, when a passenger takes a ticket at the ordinary charge, he must, according to common sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only" (*Cahill* v. *The London and North Western Rail. Co.* (1861), 10 C. B. (N.S.) 154, at p. 174: *Willes*, J. See also *Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612, at pp. 617, 618: *per Cockburn*, C.J. (*post*, p. 582)).

Section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), applies to passengers' luggage.

2. "The first question is, whether s. 7 of the Railway and Canal Traffic Act applies to passengers' luggage. On the first occasion we heard a very elaborate argument to shew that it did not apply to passengers' luggage; and it was said that the contract for a passenger's luggage was not a contract for the carriage of goods by a common carrier. In the cases cited [*Middleton* v. *Fowler* (1699), 1 Salk. 282, and *Upshare* v. *Aidee* (1697), 1 Comyns 25] that very learned judge, Lord *Holt*, seems to have thought that a coachman who carried some luggage for a passenger by the coach, was a mere gratuitous bailee, and not only was not liable as a carrier, but was not liable to take that degree of care which a bailee for hire would have to take. It was said, and I think, very possibly, said correctly, that that might probably be explained by the modes of carriage which existed at the time of Lord *Holt*, with which we are very imperfectly acquainted. But I cannot doubt the least, when a railway passenger or steamboat passenger pays a certain sum to the company for the carriage of himself and his luggage, that his luggage is carried for reward just as much as if he sent his goods by a goods train. You cannot settle the precise sum paid respectively for the carriage of the passenger and for the carriage of the luggage. But as the passenger was entitled for the fare to carry a certain amount of luggage, it seems to me absurd to say that the company are gratuitous bailees; and if they are not gratuitous bailees, it necessarily follows that they must be liable for

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Canadian Cases.

sufficient to relieve the defendants from liability to redeliver" (*Brown* v. *Canadian Pacific Rail. Co.*, 3 Man. L. R. 498: *Killam*, J.; *Penton* v. *Grand Trunk Rail. Co.*, 28 U. C. Q. B. 367, *post*, p. 589).

The expression "traffic" in the Railway Act, 1888, includes passengers and their baggage, s. 2, *ante*, p. 444.

By s. 250 of the Railway Act, 1888, it is provided that "checks shall be affixed by an agent or servant to every parcel of baggage having a handle loop or fixture of any kind thereupon, delivered to such agent or servant for transport, and a duplicate of such check shall be given to the passenger delivering the same."

the loss by carelessness. (120) Whether they are common carriers subject to the liabilities in respect of carrying passenger traffic, I do not think it necessary to determine ; but upon the authorities cited to us upon the first occasion, it seems to me that they are subject to the liabilities of common carriers for the loss of passengers' luggage ; but, at any rate, whether they are liable as common carriers or not, they are liable for the loss of passengers' luggage caused by their own or their servants' negligence. (121)

"Then the question is this : does s. 7 of the Railway and Canal Traffic Act apply ? It is this : 'Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability.' It seems to me that passengers' luggage comes within the plain words of that section. It is said that passengers' luggage is not 'articles, goods, or things ;' but it seems to me passengers' luggage must be articles, goods, or things, and come within those plain words ; and it is not because in other sections of the Act, or, possibly, in some other Act, the legislature may have used the word 'luggage' when they intended to speak of the luggage of a passenger, that it can be said that the words 'articles, goods, or things' are not sufficient in their generality to include passengers' luggage. They are clearly sufficient. Then is not passengers' luggage 'articles,

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Canadian Cases.

(120) "Under the circumstances we think a jury would be well warranted in assuming that for the amount paid, the company agreed to carry the plaintiff and his baggage. They did, in fact, take charge of his baggage, gave him a check for the same, and claimed no extra charge therefor" (*Smith* v. *Grand Trunk Rail. Co.*, 35 U. C. Q. B. 566 : *Richards*, C.J.).

(121) "This was an action brought by a passenger on the railway of the defendant company against the company as common carriers, claiming damages for loss occurring through a trunk which was with her luggage, and which contained personal clothing and jewellery, being destroyed on the line of the railway when in transit. The right to recover was rested upon the common law liability of the defendants as insurers. . . . The jury have found that the accident was caused by faulty construction, thus negativing the idea of its being attributable to any superior force not under the control or within the intervention of man. In order to constitute such a defence, there must be two things : first, an act which occurred without the intervention of man ; and, second, a result such as could not, by the exercise of reasonable care, skill and ability, have been avoided by the parties charged with the loss" (*Anderson* v. *Canadian Pacific Rail. Co.*, 17 O. R. 748 : *Rose*, J. ; and 17 O. A. R. 480).

goods, or things received, forwarded, or delivered' by the company or its servants? The passenger delivers his luggage to the company's servants, and therefore they receive it; and they carry it to the place where the passenger wishes to arrive, and when he arrives at his destination the luggage is delivered to him again. Therefore they do for reward enter into a contract to receive, and forward, and deliver that luggage; and it seems to me that it comes within the plain words. And it not only comes within the words, but it comes within the mischief which the Act contemplated; because, it is obvious that if the company choose to insert at the back of their ticket some regulation that they will not be answerable for the loss of passengers' luggage by themselves or their agents, it comes within the mischief which the Act contemplated. The passenger has no remedy, unless he gives up his journey altogether; he has no choice. Therefore it comes within the mischief, and the Act says the company shall not put unreasonable conditions of that kind upon persons who have no power to resist. Therefore it comes directly within the words, and directly within the mischief; and s. 7 ought to be construed to include passengers' luggage.

"Then the next question is, whether 31 & 32 Vict. c. 119 [The Regulation of Railways Act, 1868], s. 16, includes that provision of the Railway and Canal Traffic Act so as to apply it not only to the carriage by railway, but to carriage by steamer. It seems to me that this is a still plainer question, except for the doubt thrown upon it by the Irish case [*Doolan* v. *Midland Rail. Co.* (1876), Ir. Rep. 10 C. L. 47, afterwards reversed (1877) 2 App. Cas. 792]. But the words are so clear that there can be no doubt about it: 'The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby.' Those words in their plain and natural meaning incorporate s. 7, as well as every other section of the Act. Then why should it be excepted? The only reason is that this clause is not contained in a separate section by itself, but is contained at the end of s. 16; and therefore it is said that it is to be confined to the subject-matter to which the previous parts of s. 16 relate. I am not aware that there is any such rule of construction of an Act of Parliament. If some absurdity or inconvenience followed from holding it to apply to the whole Act, it might be reasonable to confine the incorporation to clauses relating to some particular subject-matter; but if there is no inconvenience from holding that the incorporation includes s. 7 as well as the other sections, we ought to hold that it does. For my own part, so far from thinking there is any inconvenience, I think

the direct contrary ; because, inasmuch as the passenger takes one ticket, and the company enters into one bargain for the carriage both by railway and by steamboat, it would be most inconvenient that the company should be at liberty to put conditions of this kind *quà* the steamboat, and not be able to put conditions *quà* the railway. The consequence would be that, if a passenger started and delivered his luggage to the railway company, and then arrived at the end of the journey and the luggage was not forthcoming, and nobody knew where it was lost, he would not be able to recover, because he could not prove whether it was lost during the railway passage or whether it was lost during the sea passage. Nothing can be more convenient, as it appears to me, than that the section should apply to both.

"Then it may be observed, the legislature foresaw that injustice might be done to the company in respect of carriage by sea ; they are liable to accidents and losses by the dangers of the sea to which they are not liable by land, and if they were subject to a carrier's liability for loss of luggage, which we assume they would be, it would be hard upon them ; therefore the legislature has expressly provided for that by another clause ; they can, by putting up a notice in the office, save and protect themselves against those extraordinary liabilities against which parties protect themselves by the ordinary bill of lading, that is, against losses by the dangers of the sea, etc. [31 & 32 Vict. c. 119, s. 14]. Therefore they can protect themselves from losses by the dangers of the seas ; but having so treated the liability by sea, the legislature says that they shall not be subject to the same rule when they carry by railway, and they cannot put unreasonable conditions upon a passenger which shall prevent the passenger recovering for the loss of his luggage" (*Cohen* v. *South Eastern Rail. Co.* (1877), 2 Ex. D. 253, at pp. 258, 259, 260, 261 : *Mellish*, L.J.). [Affirmed *Doolan* v. *Midland Rail. Co.* (1877), 2 App. Cas. 792, at p. 807.]

Since the above decision the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), has been passed, and by s. 28 it enacts that "the provisions of section 2 of the Railway and Canal Traffic Act, 1854 (set out, *ante*, p. 445), and section 14 of the Regulation of Railways Act, 1873, and of any enactments amending and extending those enactments shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company."

And by s. 59, s. 16, paragraph 2, of the Railway Regulation Act, 1868 (31 & 32 Vict. c. 119), is repealed.

See also Section VIII. (i), *ante*, p. 458.

(b) Definitions of Passengers' Luggage and of Merchandise.

(i.) Whatever the passenger ordinarily or usually takes with him for his personal use and convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or the ultimate purpose, of the journey, must be considered as personal luggage, whether for use or ornament, leaving the carrier herein to the protection of the Carriers Act, 1830.

(ii.) What is carried for the purposes of business or for larger or ulterior purposes is not passengers' luggage. In such a case the passenger should inform the carrier of the contents of packages brought by him to be carried and pay a fair and reasonable compensation for the same. (122)

Canadian Cases.

(122) "The authorities and references show it is much easier to say what is not personal or ordinary luggage, than it is to decide what is, which a carrier is bound or which it is usual for him, to carry along with his passenger. Personal luggage is not 'merchandise or materials bought for the purpose of being manufactured and sold at a profit,' nor merchandise or other valuables which are not designed for personal convenience, such as are usually carried by passengers for their personal use, but for other purposes such as a sale and the like" (*Wilson*, J., in *Bruty* v. *Grand Trunk Rail. Co.*, 32 U. C. Q. B. 66).

The plaintiff, a carpenter, had with him as a passenger by defendants' railway, a box containing a concertina, a *rifle, a revolver, two gold chains, a silver pencil case*, a sewing machine, and a quantity of tools of his trade such as chisels, planes, etc. The box having been lost at the Toronto station while in defendants' care :—*Held*, that the articles in italics were ordinary personal luggage, for which defendants were responsible, but that the others were not. *Held*, also, that the fact of these latter being in the box could not prevent the plaintiff from recovering for such as were personal luggage (*Bruty* v. *Grand Trunk Rail. Co.*, *ibid.*).

The plaintiff, an emigrant for Toronto, brought with him from England a box as personal luggage, which contained only rare plants and roses intended for sale. He delivered it to the defendants' baggage master at Quebec, saying that he would pay for it, but not stating its contents, on which the latter asked for his ticket, and on seeing that it was a third class government emigration ticket, he said there was nothing to pay and that it might go with the plaintiff in the train. The plaintiff said the box was marked somewhere "Plants perishable," but he could not say defendants' officers saw it, and it was sworn that if they had been notified that it was freight or merchandise, it would not have been taken :—*Held*, that the defendants were not liable for its loss (*Lee* v. *Grand Trunk Rail. Co.*, 36 U. C. Q. B. 350).

A railway company is not liable for merchandise carried by a passenger as luggage for which no extra charge was paid (*Shaw* v. *Grand Trunk Rail. Co.*, 7 U. C. C. P. 493).

(iii.) Articles carried for the purpose of sale or articles carried for hire or profit, that is to say, where a person makes a profit from the carriage of them, are not passengers' luggage. (See *Hudston* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 366, at p. 370 : *Lush*, J.)

(iv.) If a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the carrier is entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the carrier, to whom he has abstained from giving notice of the contents. In such a case the passenger carries at his own risk. (123)

(v.) The liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers ; unless, where the passenger himself takes the personal charge of them.

(vi.) If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence.

The above rules are established by, laid down in, and illustrated by the following excerpts :—

1. "The provision in the Act of Parliament [The Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 6] is equivalent to notice that the company will carry with each passenger fifty-six pounds of luggage, but *not merchandise* . . . In this case, there being no special contract, the defendants were bound to carry the plaintiff and his *luggage*, which term according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience ; perhaps even a small present, or a book for the journey, might be included in the term ; but certainly not merchandise or materials bought for the purpose of being manufactured and sold at a profit : Angell on Carriers, s. 115 ; Story on Bailments, 526, 5th ed. note. In this case, nine-tenths of the articles

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Canadian Cases.

(123) A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, etc., even where they are packed with the baggage for which they are liable. When goods remain at the station at which a passenger alights, but it does not appear that the railway company has charged, or is entitled to charge, for storage, the company is not liable as warehousemen (*McCaffrey* v. *Canadian Pacific Rail. Co.*, Manitoba Reps., vol. i., 350).

were of the latter description [124 dozen of ivory handles]. Now, if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable . . . The defendants only agreed for the stipulated fare to carry passengers and everything which constituted personal luggage, and were not bound to carry merchandise, or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that he was not carrying luggage, and therefore the loss must be borne by him. It was contended that, after the accident [a collision] happened, a new special contract was entered into, by which the company undertook to take care of the plaintiff's luggage. But that argument fails. If, indeed, an accident had happened to a perfect stranger, and the company had agreed without compensation to forward his luggage, they would, according to *Coggs* v. *Bernard*, be responsible for its loss. But in this case the plaintiff was a passenger, and the intention of the company was only to carry into effect the original contract; and from that alone their obligation arises" (*Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Ex. 30, at pp. 34, 38, 39: *Parke*, B.). (124)

Canadian Cases.

(124) A railway company is not liable for merchandise carried by a passenger as baggage for which no extra charge was paid (*Shaw* v. *Grand Trunk Rail. Co.*, 7 U. C. C. P. 493). "I do not see how this case is distinguishable from that of the *Great Northern Rail. Co.* v. *Shepherd* (8 Ex. 30), which decides that a carrier of passengers for hire is only bound at common law to carry their personal baggage. The plaintiff was a passenger paying a fare for his own carriage. He had with him a portmanteau, which was not stated by him, nor had defendants any reason apparent to know, contained anything but personal baggage, and no extra charge was made for its carriage. It contained articles of merchandise intended for sale. The portmanteau was lost, and the only question raised is the defendants' liability for these articles of merchandise. The two cases are undistinguishable. The defendants here have paid for everything but the merchandise, and the case above cited shows they are not responsible for that" (*Draper*, C.J., *ibid.*).

2. "I think it is most important as well for the public as for railway companies that the latter should be protected according to their reasonable regulations, and that they should be informed by the passengers of the contents of packages brought by them to be carried, if they are not of the description which by those regulations they are entitled to have carried free of charge. If the passenger wishes to carry merchandize, he should pay the company a fair and reasonable compensation for it. The plaintiff is found by the case to have intended no fraud; and it is also found that he ordinarily travelled on his journeys with the box in question [which contained samples of articles sold by Mr. Rimmel as a perfumer, *e.g.*, wigs, combs, etc.]: and it may be that he never paid or was required to pay anything for the carriage of it. But the time has arrived at which it is to be ascertained at whose risk it was carried. I am of opinion that it was carried at the risk of the plaintiff, because it contained merchandize for the carriage of which the company according to their Act of Parliament and their regulations were entitled to be paid and not personal luggage which within certain limits they undertake to carry for passengers free of charge. It is said that the plaintiff had no express notice that he ought to have paid for the carriage of this box; but, on the other hand, the defendants had no express notice that it contained merchandize which they were entitled to charge for, and not personal luggage. What is the contract into which the railway company enter when they receive a passenger with his luggage? Is it a contract to carry him safely together with anything which he may choose to bring with him and pass off as luggage, when in truth it is not luggage, but merchandize? I think there was no such contract. As was said by *Parke*, B., in the *Great Northern Rail. Co. app., Shepherd resp.* (1852), 8 Ex. 30, at pp. 37, 38, 'The contract was, to carry passengers and their luggage. If the company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but, if no notice is given, there is an unfair concealment, which prevents them from making a charge as for merchandize.' It seems to me that that is perfectly just. If the passenger so conducts himself towards the company as to prevent them from getting a fair remuneration for the carriage of merchandize, he may very well be held to have it carried at his own risk. I am clearly of opinion that there was no such contract by the company to carry the plaintiff safely with the box in question as is set out in this declaration. I rest my judgment upon the authority of the case of *The Great Northern Rail. Co. app., Shepherd resp.* So far as to the common law liability.

"I am further of opinion, and, if need was, I should be prepared to hold, that, where a company is created by Act of Parliament, having privileges and rights granted to them, and liabilities and duties imposed upon them, in respect of their incorporation, parties dealing with them must be taken to be cognizant of the provisions of the Act of Parliament granting those privileges and rights and imposing those duties and liabilities, although it be a private Act" (*Cahill* v. *The London nd North Western Rail. Co.* (April, 1861), 10 C. B. (N.S.) 154, at pp. 171, 172 : *Erle*, C.J.).

3. "I think that, when a passenger takes a ticket at the ordinary charge, he must, according to comm on sense and common experience, be taken to contract with the railway company for the carriage of himself and his personal luggage only ; and that he can no more extend the contract to the conveyance of a single package of merchandize than of his entire worldly possessions. That is the view which is taken in Story on Bailments, ss. 498, 499, and also by Lord *Wensleydale* in *The Great Northern Rail. Co. app., Shepherd resp.* (1852), 8 Ex. 30. It is rather a conclusion of fact than of law, that the ticket entitles the party who purchases it to have himself and his personal luggage carried for the price he pays, and nothing more. In the absence, therefore, of some contract for the conveyance of that which does not answer the description of personal luggage, the plaintiff cannot be entitled to recover for its loss" (*ibid.*, at p. 174 : *Willes*, J.).

4. "It is an indisputable fact that the railway on which the plaintiff was a passenger, was one, the proprietors of which had announced to the world that they would not take merchandize as passengers' luggage, but that if a passenger took merchandize with him, he was bound to pay at a certain rate for the carriage of that merchandize. Now that rule or law of the company was well known to the plaintiff ; notwithstanding which, the plaintiff took into the carriage of the company, along with him, a case containing merchandize [watches], and he took it into the carriage without any communication to the company of what he was doing. It is quite plain that he intended to carry, as personal luggage, that which he was bound in ordinary fairness to have stated to be, and paid for as, merchandize. In the course of the journey a guard of the company applies to the plaintiff, and desires that the case may be removed to the luggage van, and it is so done accordingly.

"Now, the plaintiff knew perfectly well that the law of the company was the law of the servants of the company ; he knew well, therefore, that the servants of the company were bound to

obey it; and he could not at all in reason, or in justice, found himself upon any liability of the company contracted by an act done by a servant of the company in direct contravention of the rule laid down by the company for the guidance of its servants. In substance, therefore, it comes to this; that the plaintiff intended to have the goods carried in the carriage with him, and thus to escape the obligation of paying for their carriage as merchandize; and under these circumstances there could not exist, in law or in reason, any contract whatever between the plaintiff and the company touching those goods, upon the breach or in default of the performance of which contract the plaintiff could have a right against the company" (*Belfast and Ballymena, etc. Rail. Cos.* v. *Keys* (July, 1861), 9 H. L. Cas. 556, at pp. 572, 573: Lord *Westbury*, L.C.).

5. "Now, the original contract certainly was, that the plaintiff was not to pay anything for his luggage: it was included in his fare. But he was bound to pay for merchandize, and that acceptance of it by Connolly [the guard] would not create an alteration of that original contract with the company. Anything done by him in the course of the journey from one end to the other could not alter the original contract made by his employers" (*ibid.*, at p. 575: Lord *Wensleydale*).

6. "The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger. Under the older system of travelling by stage-coaches, canal boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established.

"The provision fixing the amount of luggage which the traveller shall be entitled to take with him free of charge has a twofold object: first, that of securing to the traveller the conveyance of a reasonable amount of luggage; secondly, that of protecting the carrier from all dispute as to the amount of luggage which the passenger may claim to have carried, as well as of entitling the former to a proper remuneration for the carriage of luggage in excess of the quantity thus fixed by statute.

"Besides thus fixing the quantum of luggage which the passenger shall be entitled to have carried free of charge, the Railway Acts have, in conformity with the practice of carriers under the old system, taken care expressly to limit the right of the passenger to ordinary luggage, which must be taken to mean the personal luggage of the traveller.

"The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes the personal charge of them as in *Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44, in which case other considerations arise [see *post*, pp. 589—591].

"On the other hand, the obligation of a railway company, or other carriers of passengers, to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what properly falls under the denomination of personal luggage, or has been accepted by the carrier as such, that the liability to carry safely, irrespectively of negligence, attaches.

"It is necessary to state the proposition with this qualification; for, as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier, it follows that in either respect it may be waived by the latter; and, consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence.

"Thus in the cases of *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Ex. 30, Lord *Wensleydale* says: 'If the company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible.' Again he says [at pp. 38, 39]: 'If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of

weight, if the company chose to allow a passenger to carry more, they would be liable.'

"In like manner, in *Cahill* v. *London and North Western Rail. Co.* (1862), 13 C. B. (N.S.) 818, [at p. 819] I expressed the opinion of the Court of Exchequer Chamber when I said, 'If a railway company, who by their Act of Parliament are bound or by their regulations profess to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandize, I quite agree that it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandize and not of ordinary luggage. But, on the other hand, if a passenger who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandize, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk.'

"It being clear that the contract on the part of a railway company is to carry personal luggage only, it follows that it is only in respect of what can properly be termed personal luggage that a liability in case of loss, in the absence of negligence, arises. The difficulty in the present case, as it has been in many others, is to determine what properly comes under the description of ordinary personal luggage. The definition of baggage, which is here a synonym of luggage, given in Story on Bailments, s. 499—namely, 'such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use but for other purposes, such as a sale and the like'—though it appears to have been approved of by Lord *Wensleydale* in the case before cited, has been criticised in America, as appears from the note of the editor of the 7th edition of Mr. Justice Story's work, on the ground that what is 'usually' carried by one man differs materially from what is usually carried by another. It seems to us, however a misapprehension to suppose that Mr. Justice Story intended to say that ordinary passengers' luggage comprehended only that which was common to all passengers. We believe him to have used the term 'usually' relatively to the habits and wants of the different sorts and classes of travellers.

"In *Phelps* v. *London and North Western Rail. Co.* (1865), 19 C. B. (N.S.) 321, which is an authority binding upon us, the question for the court was whether an attorney, travelling as a passenger on a railway, was entitled to carry with him in his

portmanteau, as ordinary luggage, the deeds and documents which were required as evidence on a trial which he was going to attend. The Court of Common Pleas held that he was not. *Erle*, C.J., says, at p. 330: 'It is agreed on all hands that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveller: that which one traveller would consider indispensable, would be deemed superfluous and unnecessary by another. *But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance.*' This at once illustrates in what sense the word 'usually' is employed by Story, and affords a strong reason why the word 'usual' or the word 'ordinary,' or some word equivalent in effect, should be considered as qualifying the word 'luggage.' The cases of *Cahill* v. *London and North Western Rail. Co.* (1862), 13 C. B. (N.S.) 818, *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Ex. 30, and *Belfast and Ballymena, etc. Rail. Cos.* v. *Keys* (1861), 9 H. L. Cas. 556, establish that articles of merchandise cannot be considered as personal luggage.

"In *Hudston* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 366, the point arose in a different manner. The plaintiff there had tendered to the company a spring horse which he had purchased, and was taking home to his children as part of his luggage. The company refused to receive it unless he paid for the carriage, whereupon he paid the charge, and afterwards brought an action to recover back the sum he had so paid. My brother *Lush* in that case observes [at p. 370]: 'It is extremely difficult to frame a definition in terms which shall embrace all that is intended to be brought within the regulation, and exclude all that is intended to be excluded. I cannot say that I am satisfied with any of the definitions which have hitherto been given. They have been quite enough for the cases in which they have been pronounced, but it does not appear to me that any of them are perfect.' He then proceeds to say: 'The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage.' He then proceeds to hold that the dimensions and size of this spring horse took it out of this definition.

"Considering the way in which the point arose in the last case, namely, on the refusal of the company to accept and carry it gratis, it was certainly relevant to inquire whether the article was such as might be reasonably rejected by the company on account of its size and shape, though it did not exceed the statutable weight. While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles

unconnected with the personal use and convenience of the traveller, or, as in *Hudston* v. *Midland Rail. Co.* [*supra*], of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use and convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. On the other hand the term 'ordinary luggage' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier" (*Macrow* v. *Great Western Rail. Co.* (1871), L. R. 6 Q. B. 612, at pp. 617, 618, 619, 620, 621, and 622: *Cockburn*, C.J., delivering the judgment of the court (*Cockburn*, C.J., *Blackburn* and *Mellor*, JJ.)).

7. "A bicycle—however common it may be among people to carry bicycles about with them—cannot be said to be carried as luggage, in the sense of ordinary personal luggage" (*Britten* v. *Great Northern Rail. Co.*, [1899] 1 Q. B. 243, at p. 249: *Channell*, J.).

(c) Passenger having the Custody and Control of his Luggage.

The placing of articles of luggage in the carriage with a passenger by the joint consent of the passenger and the carrier does not necessarily relieve the carrier from his obligation to carry such articles safely; though the carrier's ordinary wide liability as common carrier is thereby modified to the extent that he is not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

The principle above expressed is laid down in many cases, quotations from some of which follow:—

1. "It has been determined, that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon

the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost" (*Robinson* v. *Dunmore* (1801), 2 B. & P. 416, at p. 419 : *Chambre*, J.).

2. "I am very far from saying that there may not in these cases sometimes be a state of circumstances in which a passenger, who has luggage which, by the terms of the contract, the company are bound to convey to the place of his destination along with him, may not release the company from their obligation, as carriers for the safe custody of the article, by taking it into his own personal custody and charge : but, I think, the circumstances must be strong to relieve the company from their liability ; it is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely. (125) Nothing could

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(125) The system of checking is an additional precaution adopted by railways for their own security, and does not affect their liability.

Plaintiff, travelling on a first-class passenger ticket on defendants' railway, from Chatham to Toronto, had a travelling bag which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car, in order to retain the place, and on his return from the refreshment room it was gone :—*Held*, that defendants were liable for the loss (*Gamble* v. *Great Western Rail. Co.*, 24 U. C. Q. B. 407).

"Plaintiff was entitled under the contract of carriage to be carried from Chatham to Toronto by defendants *with his luggage*, of which the bag was a part. It is not easy to understood how, on such a state of facts, the defendants, as carriers, are not responsible for the safe carriage of this passenger's luggage. There is no suggestion of any personal neglect or violation of any known rule or course of dealing on the plaintiff's part. He was received by defendants in their train in the ordinary way ; his bag is placed near him, as far as we are told, not in any improper or unusual place. During the transit he leaves the train, with other passengers, for refreshment, in a manner permitted or at least not objected to by defendants, and on returning to his seat his bag is missing. We cannot see how defendants can escape liability" (*Hagarty*, J. : *ibid.*, at p. 409).

"The law of common carriers, either by railway or otherwise, I take to be the same here as in England, and therefore, if it be determined there in any particular case that a contract is implied, the same contract will arise here, unless some special condition has been introduced by the company for their own protection. In this case there is a reference to the system of checking, which prevails here with regard to luggage carried on railways, but not in England. I have considered whether the existence of this practice should make any difference, and my conclusion is that it must be regarded, as introduced by the company for their own benefit, not for that of the passengers. If the law be the same in both countries, and makes the company

be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have with him in the carriage in which he is about to ride, should be discontinued ; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion, which would relieve the company under such circumstances from the obligation, as carriers, to carry the luggage safely, which, for general convenience, ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss" (*Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54, at pp. 58, 59 : *Cockburn*, C.J.). (126)

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liable for passengers' luggage, as I take it to do, then I do not see how the responsibility can be altered by any difference in the system which they may choose to adopt for the care and management of it" (*Draper*, C.J. : *ibid.*).

"The difference existing in the mode of stowing the baggage of railway passengers in this country and in England ought not, in my opinion, to change the nature of the liability of the company as common carriers" (*Gamble* v. *Great Western Rail. Co.*, 3 Error and Appeal Reports, Ontario, 163 : *Richards*, C.J., in affirming judgment of court below).

The plaintiff was a passenger on one of defendants' cars, occupying a sleeping berth. Before going to sleep he had undressed himself, and had put his pocket book containing his money in his trousers pocket, rolling up his trousers, and putting his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket book and money were gone. No negligence in defendants was shown :—*Held*, that no liability attached to the defendants (*Stearn* v. *Pullman Car Co.*, 8 O. R. 171). "I agree that the rule must be discharged. Unless the mere fact of loss is presumptive evidence of negligence on the part of the company, and of such negligence as would render them liable to make good the plaintiff's loss, there is no evidence to entitle the plaintiff to call upon the defendants to offer defence" (*Rose*, J. : *ibid.*).

(126) The plaintiff, an intending passenger by the defendants' railway, a quarter of an hour before the train started, entered a passenger car standing at the station at the original starting point, left his valise on a vacant seat and went out, and on his return shortly afterwards his valise was gone. It was not shown that at the time he left the vali[illegible]nyone was in charge of the

3. "The law laid down by *Chambre*, J., in *Robinson* v. *Dunmore* (1801), 2 B. & P. 416, at p. 419, as to stage-coaches has been considered by eminent authorities to be in general equally applicable to railway carriages, viz., that 'if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost' (see *Richards* v. *London and Brighton Rail. Co.* (1849), 7 C. B. 839; *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C. B. 13; *Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54); though it has been questioned by equally high authority

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train or that there was any other passenger in the train. A verdict having been given at the trial for the plaintiff, a new trial was granted on the application of defendants (*Kerr* v. *Grand Trunk Rail. Co.*, 24 U. C. C. P. 209).

"This point cannot be satisfactorily settled by merely asking whether the plaintiff had, by his neglect, contributed to the loss. The more important question is: was the valise even delivered to the defendants to be carried—was it ever in their proper charge as carriers? A quarter of an hour before the starting of the train in a station at the original starting point, the plaintiff enters a carriage and leaves his valise on the seat. There is no evidence that any one was then in charge of the things in the train, or that any passengers, except the plaintiff, had entered. After leaving it there he goes out. It is not easy to see in whose actual charge or care it was during his absence" (*Hagarty*, C.J.: *ibid.*).

Plaintiff travelled by defendants' railway from Paris to Seaforth as a passenger, with two trunks, which were checked to Seaforth. The trunks were put from the train on to the station platform and were removed by the company's servants, the plaintiff assisting, into the station baggage room. This was at 3 p.m. The baggage room was said to have been locked from 6 p.m. (at which time the trunk was said to have been safe) to 9.30 p.m., when plaintiff sent for the trunks. One trunk was then missing, which was the subject of the action. The question to be decided was, had the defendants possession and care of the plaintiff's trunk as common carriers from the time the plaintiff helped to convey it into the baggage room at 3 p.m., until the time it was supposed to have been stolen between 6 and 9 p.m.:—*Held*, that defendants were not responsible; that their duty as common carriers ended when the trunk had been placed on the platform and the defendant had had a reasonable time to remove it, as he clearly had. "The plaintiff had a reasonable opportunity to take the trunks away. This he did not do, but he had them put, and assisted in putting them, into the company's baggage room at the station, where they remained for several hours without charge, entirely for his convenience. His helping to carry the trunks into the room shews such a possession by, and delivery to him as takes this out of some of the cases cited. The plaintiff was entitled to a reasonable time after the goods were put on the platform to call for and take them away. There is no room for doubting but that he had this full and reasonable time" (*Penton* v. *Grand Trunk Rail. Co.*, 28 U. C. Q. B. 367: *Adam Wilson*, J.). The case of *Inman* v. *The Buffalo*, 7 U. C. C. P. 325, followed.

whether the liability in respect of passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect of the passengers themselves to whom they are accessory: *Stewart* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 135; and see *Munster* v. *South Eastern Rail. Co.* (1858), 4 C.B. (N.S.) 676; and it should be remarked that in the case of *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C. B. 13, and *Le Conteur* v. *London and South Western Rail. Co.* (1865), L. R. 1 Q. B. 54 there was evidence of negligence on the part of the company's servants.

"Whatever may be the correct solution of this question, it is obvious at least that with respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he and not the company's servants has *de facto* the entire control of them whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is, in fact, considerably modified by the circumstance of their being during that part of the journey in which the passenger might, under ordinary circumstances, be expected to be in the carriage intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to ensure the safe delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied. If the passenger packed up articles liable to ignition by friction and by the shaking of the carriage they caught fire; if a passenger were to look on whilst his luggage was being taken away or rifled, when he might reasonably be expected to interfere; if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there whilst he unreasonably absented himself and they were in consequence purloined, he would have no more just reason for complaint against the carrier than if he had upon some false alarm thrown his property out of the carriage window. The latter case, equally as the former, would in terms be out of the exception of the act of God or the Queen's enemies, and the rule specially affecting the liability of common carriers, if construed literally, and without regard to the reason upon which it is founded, would prevail. There is great force in the argument that where articles are placed with the assent of the passenger in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier,

which is founded on the bailment of the goods to him and his being entrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.

"There is, moreover, a general principle applicable to these as to all bailments, viz., that the bailee shall not be heard to complain of loss occasioned by his own fault, and the loss in this case was so occasioned, and without such fault would not have taken place. In truth the expression 'contributory' negligence in such a case is inaccurate if it imply any negligence on the part of the company, all the negligence having flowed from one source, viz., the conduct of the passenger, and the whole loss having been occasioned thereby" (*Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44, at pp. 50, 51, 52: *Willes*, J., delivering the judgment of the court).

4. "I must express my opinion that the views expressed by Lord *Truro*, *Jervis*, C.J., *Williams*, J., *Crowder*, J., *Willes*, J., *Keating*, J., and *Montague Smith*, J., do not appear to have had sufficient weight given to them—see *Richards* v. *London, Brighton and South Coast Rail. Co.* (1849), 7 C. B. 839; *Talley* v. *Great Western Rail. Co.* (1870), L. R. 6 C. P. 44; *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C. B. 13—by the judgment in the Court of Appeal in *Bergheim* v. *Great Eastern Rail. Co.* (1878), 3 C. P. D. 221. All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default" (*Great Western Rail. Co.* v. *Bunch* (1888), 13 App. Cas. 31, at p. 42: Lord *Halsbury*, L.C.).

5. "I prefer the principle which appears to me to have been adopted in *Richards* v. *London Brighton and South Coast Rail. Co.* (1849), 7 C. B. 839, and *Butcher* v. *London and South Western Rail. Co.* (1855), 16 C. B. 13. I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury

occurring during its transit, to which the act or default of the passenger has been contributory" (*ibid.*, at p. 48 : Lord *Watson*).

6. "I concur entirely in the opinions which have been expressed by the noble and learned Lord upon the Woolsack (Lord *Halsbury*) and the noble and learned Lord on my right (Lord *Watson*)" (*id.*, at p. 53 : Lord *Herschell*). (127)

Railway Cloak Room.

By receiving a passenger's luggage in their cloak room, it seems that the railway company become warehousemen or common law bailees of such luggage (see *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C. B. (N.S.) 75, and *Pratt* v. *South Eastern Rail. Co.*, [1897] 1 Q. B. 718. See also *post*, pp. 594, 595, *Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833, at p. 837 : *Collins*, L.J.).

Loss arising off the Line of the Company.

"By the condition referred to on the ticket, the defendants were not to be liable for any loss arising off their own lines : that must receive a reasonable construction, and in order to bring themselves within it they must shew that the luggage when lost was out of their custody. It was the defendants' duty to carry it from one platform to the other, for it must be taken that by their contract they were bound to take the luggage from their own train to that of the North Western train ; and they were entitled to the service of the porters at the station. Consequently the porter, while he was taking the luggage from one platform to the other, was acting as the defendants' agent or servant. The defendants, therefore, have failed to shew that it was ever out of their custody, and to establish that in point of fact the loss occurred off their line" (*Kent* v. *Midland Rail. Co.* (1874), L. R. 10 Q. B. 1, at p. 4 : *Cockburn*, C.J.).

See also, *ante*, p. 499, Section XI.—End of Transit.

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(127) The plaintiff being a passenger on the defendants' railway, gave his baggage in charge of their servants. The baggage having been lost, the plaintiff sued for the value of the articles, and damage sustained in consequence of such loss, both in expense incurred thereby and loss of time:—*Held*, that the damage must be confined to reasonable expenses of searching for the baggage, such as telegraphing, cab hire in going to defendants' office, etc. (*Morrison* v. *The European and North American Rail. Co.*, N. B. Rep. 2 Pug. 295 ; *Whitman* v. *Western Counties Rail. Co.*, 5 Russell and Geldert (N.S.) 405).

(d) Servants' Luggage.

"Upon what principle does the action lie at the suit of the servant for his personal sufferings? Not by reason of any *contract* between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other" (*Marshall* v. *The York, Newcastle and Berwick Rail. Co.* (1851), 11 C. B. 655, at p. 662: *Jervis*, C.J.).

(e) Lien on Luggage.

A Carrier has no Lien on the Passenger himself or the Clothes he is actually wearing, but has a Lien on his Luggage. (128)

1. "The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be given for carrying the man and the luggage. I think the captain has a lien for this upon the luggage. In detaining that, there is

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(128) "As to the lien on the valise for the steamboat fare. It appears there is such a right. . . . The company and the purser for them had the right, if in possession of the valise, to keep it for the unpaid fare, assuming it to have been unpaid; but neither the company nor the purser had the right to commit an assault for the purpose of acquiring a lien, and, in my opinion, the company are not liable for the unauthorised act of the purser" (*Emerson* v. *Niagara Navigation Co.*, 2 O. R. 538: *Wilson*, C.J.).

"It is not disputed that the defendants have a lien on the luggage of a passenger to secure payment of his fare, and, consequently, that any person appointed by them as their officer to collect such fare, has an authority derived from them to exercise such right, and that in so doing he must and should be considered as acting under such authority, and they are responsible for his acts. If, therefore, the person whose duty it is to collect the fares of the passengers should, under a mistaken belief that a passenger had not paid his fare, insist on detaining the luggage of a passenger until his fare was paid, the defendants would be responsible for his act, as he was engaged in discharging a duty specially delegated to him, and exercising a right which they possessed. But the defendants have no right or authority to exercise the power of forcibly taking possession of the passenger's luggage which is in his actual personal possession, by way of asserting a lien, and, consequently they can confer none on their servants. If, therefore, their officer does not act in that manner, he cannot be said to be acting under their authority, and they are not responsible" (*Galt*, J.: *ibid.*).

no greater inconvenience than in the common case of goods and merchandise carried on freight; and there is no reason why there should not be the same lien for the recovery of passage money as for the recovery of freight. I conceive the defendant had a right to say to the plaintiff, 'You shall not have your things till you pay me what is due for bringing them, and you from Brazil'; and that in refusing to deliver them up, he was not guilty of any tortious conversion" (*Wolf* v. *Summers* (1811), 2 Camp. 631: *Lawrence*, J.).

2. Plaintiff went to the coach-office of the defendant, in Liverpool, and asked the fare to London by the express coach; and being told 30*s*., he put down a 30*s*. Irish note on the counter, which the book-keeper declined taking; the plaintiff took the note up.

For the defendant, witnesses were called, who stated that, after taking up the 30*s*. note, the defendant [*qu.* plaintiff] said, "Book me an outside place on the express, and I will leave my portmanteau," and that an outside place was accordingly booked.

Lord *Tenterden*, C.J. (in summing up): "If you believe that the plaintiff said that which has been stated by the defendant's witnesses, I think that it gives him a lien on the plaintiff's portmanteau for something, certainly not for 30*s*., but for something" (*Higgins* v. *Bretherton* (1831), 5 C. & P. 2).

Lien for Cloak-room Charges on Hired Machine.

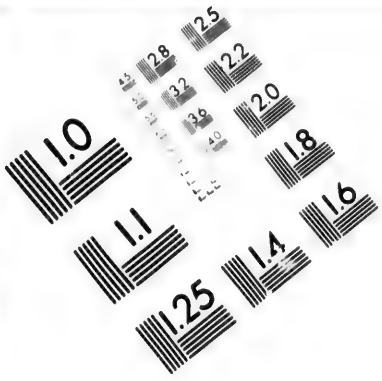
3. "I think the sewing machine in this case must be taken to be deposited in the cloak-room just in the same way and subject to the same rights as if it were entrusted to a carrier for the purpose of carriage. I think that having regard to modern decisions and the rising standard of convenience to which railway companies are obliged to conform, the cloak-room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage. The company are common carriers of passengers' luggage, and if they carried this sewing machine they would be common carriers of this sewing machine, and would have a lien upon it against all the world in respect of the cost of carrying it. I do not see why they should not equally have a lien for receiving it and warehousing it in their cloak-room. The same principle lies at the root of both. They are under an obligation now to give reasonable facilities for the receipt and safe custody of baggage, and it was in the performance of that obligation that they received this sewing machine. Therefore, on that ground it seems to me the lien is good, not only against the person depositing it, but against the owner. I think

in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak-room if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine, who had not determined the hire-purchase agreement at the time that those rights were acquired by the railway company. If the owners subsequently determined that agreement, they must determine it subject to the rights which had been acquired, that is, subject to the lien of the defendants for their charges" (*Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833, at pp. 837, 838: *Collins*, J.).

Canadian Cases.

(105) [*Ante*, p. 540.] "Railway companies are bound to have proper accommodation for passengers on their line, and to take good care of them while they are in their charge. If any injury is caused to a passenger for want of accommodation or want of care, it is deemed negligence on their part, and they are liable for damages occasioned thereby" (*McGinney* v. *Canadian Pacific Rail. Co.*, 7 M. L. R. 153: *Dubuc*, J.).

(58) [*Ante*, p. 470.] A contract was made by a railway company for carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle and that the person in charge should be entitled to a "free pass," but only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants. It was held that the condition was valid and could be taken advantage of by the connecting railway company, who, therefore, were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence (*Bicknell* v. *Grand Trunk Rail. Co.*, 26 O. A. R. 431).



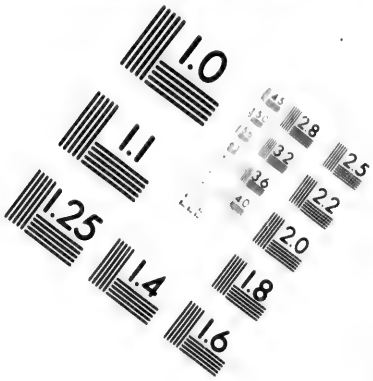
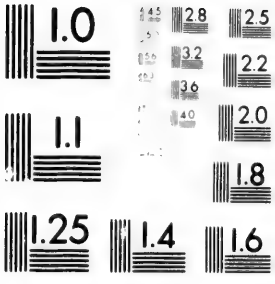
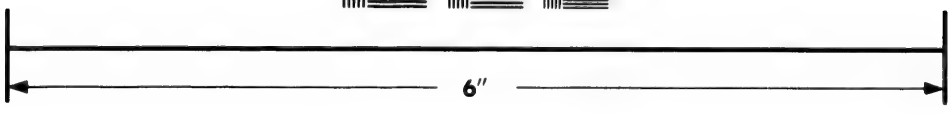
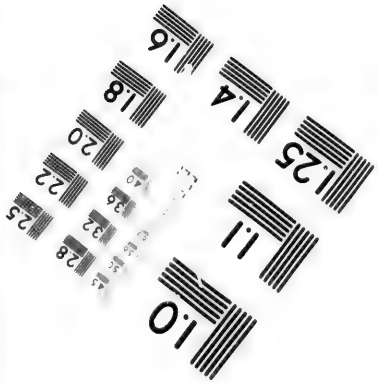
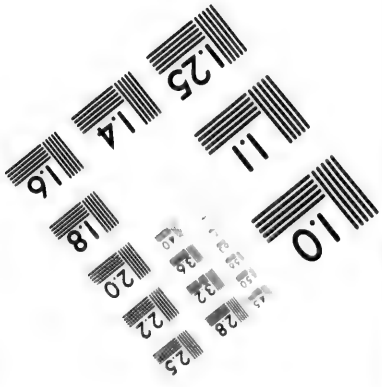


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SECTION XVI.

CHARTER-PARTY AND BILL OF LADING.

(a) *Definition of a Charter-party, and its Object*, p. 596.
(b) *Definition of a Bill of Lading and its Objects*, p. 597.
(c) *Liability on a Bill of Lading Signed by the Master*, p. 598.
(d) *Deviation*, p. 605.
(e) *Expansion of Exceptions in a Bill of Lading by the Charter-party*, p. 610.
(f) *Form of a Bill of Lading*, p. 612.
(g) *Bill of Lading, its Office, Nature, and what it is Evidence of*, p. 613.
(h) *Master's Authority at Common Law to Give and Sign Bills of Lading*, p. 619.
(i) *Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111)—*Transfer by Indorsement—Bill of Lading Conclusive Evidence, etc.*, p. 622.
(k) *Exemption of Carriers from Absolute Liability by Means of Exceptions in Charter-parties, and Bills of Lading*, p. 635.

(a) Definition of a Charter-party, and its Object.

A "*Charter-party* [*charta partita*, Lat.; *chartre parti*, Fr.]" is "a deed or writing divided, or pair of indentures among merchants or seafaring men, containing the covenants and agreements made between them, touching their merchandise and maritime affairs. A charty-party of affreightment settles agreements as to the cargo of ships, and binds the master to deliver the cargo in good condition, at the place of discharge or consignment according to agreement (dangers of the sea excepted); and sometimes the owner or master binds himself, ship, tackle, and furniture for due performance. It is distinguished from a bill of lading, in that it states the terms and conditions of the freight or carriage, whereas a bill of lading merely ascertains the contents of the cargo: 2 Inst. 673; Abbott on Shipping, p. 3, c. 1" (Wharton's Law Lexicon).

Object of a Charter-party.

"The object of a charter-party is to fix the contract of the ship-owner and the shipper as to the carriage and delivery of the goods of the latter on board ship from one place to another. It is therefore necessary that the charter-party should deal with the time, place, and manner, of loading the goods on board, the time and possible course of the voyage, and the time and mode of discharging the cargo from the ship. When it is required to determine the mode of delivering the cargo, it is necessary to determine the time and place of the termination of the voyage,

because there cannot be delivery till that is ended" (*Tharsis Sulphur and Copper Company* v. *Morel Brothers and Co.*, [1891] 2 Q. B. 647, at p. 649: Lord *Esher*, M.R.).

(b) Definition of a Bill of Lading, and its Objects.

A "*Bill of Lading*" is "a memorandum, signed by masters of ships, in their capacity of carriers, acknowledging the receipt of merchants' goods; of which there are usually three parts, one kept by the consignor, one sent to the consignee, and one preserved by the master. It is the evidence of and title to the goods shipped" (Wharton's Law Lexicon). (129)

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(129) In *Warren* v. *Wilson*, U. C. Q. B. (o.s.), VI. 435, where the owner of a vessel undertook by his bill of lading to carry goods without any exception as to the dangers of navigation or otherwise, and the goods were lost in a violent tempest, it was held that the owner was liable.

"As regards contracts for carriage of goods by sea, the legislature has not interposed to control the contracts of the parties, stipulating for freedom from liabilities for negligence, as it was in England in the case of railway and canal companies, and here also to some extent in the case of railway carriers. In cases like the present the parties are free to enter into any contract they may think fit" (*Trainor* v. *Black Diamond Line*, appeal from the Supreme Court of Prince Edward Island dismissed, 16 S. C. R. 156: *Strong*, J.). See *post*, p. 639.

"A bill of lading is ordinarily both a receipt and a contract. In certain cases it operates only as a receipt. Such is the case where there is a charter-party. A charter-party is a formal instrument containing usual terms of a contract of carriage, and where it exists it is not to be supposed that there is an intention to supersede it by the bill of lading. In some cases both are to be construed together. But, where there is only an informal contract by correspondence, the formal bill of lading, when given, would ordinarily be treated as containing the concluded contract, unless an intention to the contrary appear" (*The North-Western Transportation Co.* v. *McKenzie*, 25 S. C. R 45: *King*, J.). See definition of Bill of Lading in the Banking Act, 53 Vict. c. 31 (C), s. 2 (*e*).

"Upon this construction it follows that 'bill of lading' means the instrument used in the province in the general course of inland shipping business, and includes the bill of lading in this case, if, as I apprehend, it is the general practice for the purser to sign such instruments; and it follows, further, that the giving a receipt for the purposes of this Act [Consol. Stat. Can. 1859, c. 54, s. 8, now repealed. See Bank Act, Can. 1890, c. 31] is in terms limited to warehousemen, millers, wharfingers, masters of vessels and carriers. A bill of lading is in law an instrument which affords evidence of title to the goods specified in it, as shipped, and by its endorsement and delivery a transfer of the title to those goods is generally effected" (*Royal Canadian Bank* v. *Carruthers*, 29 U. C. Q. B. 289: *Draper*, C.J.).

A shipping note is a bill of lading. "As to the point argued, that the shipping note is not a bill of lading within the meaning of the Act [33 Vict. c. 19 (O)], we are of opinion that it is. Although the Act is a transcript, except in one particular, of the English Act, which relates only to carriers by water,

Objects of a Bill of Lading.

"A bill of lading is a contract for the carriage of goods on board a ship, and the first thing which the shipper and the shipowner must agree upon is the voyage. As was said in *Leduc* v. *Ward* (1888), 20 Q. B. D. 475, at p. 480, the object of the shipper is to have his goods carried from one place to another, in order that when they reach the place of destination they may be either sold or used. The object of the shipowner is to carry the goods from the one place to the other; and upon the voyage on which he is to carry them depends the freight—that is the charge which he can properly make for carrying them" (*Margetson* v. *Glynn*, [1892] 1 Q. B. 337, at p. 339: Lord *Esher*, M.R.). (130)

See also *post*, p. 613.

(c) Liability on a Bill of Lading signed by the Master.

In construing a charter-party with reference to the liability of the owners of the chartered ship on bills of lading, it is necessary to look to the charter-party, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew.

Primâ facie a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner.

The question is whose servant or agent is the master when he signs the bill of lading?

Canadian Cases.

yet from the particular wherein it differs from that Act it is plain that the legislature intended that the Act should apply to railway carriers, as well as to carriers by water. The words 'or train' introduced into the third clause is conclusive upon this point. We must, therefore, give to the language used such a construction as will assist and not defeat the plain intention of the legislature. This shipping note is to all intents and purposes a bill of lading for goods delivered to be carried by the railway, and indeed, the term bill of lading seems to be a more accurate term than shipping note" (*Royal Canadian Bank* v. *Grand Trunk Rail. Co.*, 23 U. C. C. P. 232, 233: *Gwynne*, J.).

(130) "A bill of lading for delivery of goods to the consignee transfers the property to him. If for delivery to the consignor, he still retains his property in the goods" (*In re Coleman*, 36 U. C. Q. B. 576: *Wilson*, C.J.).

"The bill of lading is conclusive only as between the master or the person who signs it and the consignee or indorsee for value. It is conclusive in no other cases or between any other persons" (*Murton* v. *Kingston*, 32 U. C. C. P. 373: *Wilson*, C.J., *post*, p. 622).

1. "The result of the authorities, from *Parish* v. *Crawford* (1746), 2 Str. 1251 downwards, and more especially the case of *Colvin* v. *Newberry* (1832), 1 Cl. & F. 283, in which the judgment of the Court of Exchequer Chamber (*Newberry* v. *Colvin* (1830), 7 Bing. 190; 1 C. & J. 192) reversing the judgment of the Court of Queen's Bench [*Colvin* v. *Newberry* (1828), 8 B. & C. 166] was affirmed on appeal by the House of Lords, is to establish the position, that in construing a charter-party with reference to the liability of the owners of the chartered ship, it is necessary to look to the charter-party, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which by the law merchant arises the authority to sign bills of lading by which the owner will be bound. . . . (131)

"We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind

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Canadian Cases.

(131) [*Post*, p. 622.] Where a vessel is chartered for a voyage, the charterer is considered the owner *pro tempore*, and the master, whether appointed by him or not, is considered as his agent in signing bills of lading, and the charterer is liable for any misconduct of the master arising out of the obligations of the bills of lading. In such an action against the charterer of a vessel for non-delivery of goods shipped under a bill of lading signed by the captain, if the defendant claims that damages should be reduced by a claim for general average, the burden is on him to establish the liability and show the amount" (*Burpee* v. *Carvill*, 16 N. B. R. 141).

"As to whether or not there was a demise of the vessel, the question in such cases is not one of title but of control. Has the owner parted during the period of the charter-party with the entire possession and control"? (*The Collins Bay Rafting and Forwarding Co.* v. *Kaine*, 29 S. C. R. 255: *King*, J.).

his owner by giving bills of lading. We proceed on the well-known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made.

"In *Newberry* v. *Colvin* (1830), 7 Bing. 190, at p. 207, *Tindal*, C.J., in delivering the judgment of the court, observes that the finding of the jury, that the charter-party was known to the shippers, 'negatives any inference that would otherwise arise, that Betham [the master], by reason of his command of the vessel, was held out by the defendants to the plaintiffs below as their agent in the conduct and management of the ship, as they [the shippers] knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage.' From this language it may be inferred, that, had this material circumstance not existed in that case, the decision might have been different, even though the court there held that there had been a demise of the ship.

"In the case of *The St. Cloud* (1863), Brow. & Lush. 4, at pp. 15, 16, which was recently before the Court of Admiralty, but which was not referred to on the argument before us, Dr. Lushington, a very high authority in such matters, on a charter-party substantially the same as the present, and where the goods had been shipped in ignorance that the vessel was under charter, held the owners liable on bills of lading signed by the master. After referring, as to the effect of the charter-party, to *Schuster* v. *McKellar* (1857), 7 E. & B. 704, at p. 723, he goes on to say: 'But there is an important distinction in this case. The shipper is not proved to have had

notice of the charter-party. Until he had such notice, he would be justified in supposing that, in dealing with the master for the carriage of his goods, he was dealing with the owner's agent; for, *primâ facie*, the master is the agent of the owner of the ship. I cannot think that it is consistent with justice, or according to the ordinary mercantile practice, that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage, on account of a charter of this description, of which he has no notice. I think the burthen of proof must fall upon the shipowner claiming exemption from liability; he must shew that the shipper had notice of the charter, and was aware that in making the contract, the master was agent for the charterer.' In this view we entirely concur, and hold the defendants to be liable" (*Sandeman* v. *Scurr* (1866), L. R. 2 Q. B. 86, at pp. 96, 97, 98: *Cockburn*, C.J., delivering the judgment of the court). (132)

Two Contemporary Owners—Registered Owner—Owner for a Particular Adventure appointing Master and Crew.

2. "There may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers and crew of the ship, pays them, employs them and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is, for those purposes during that time, in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordships' judgment, as I apprehend, which would detract in the least from

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Canadian Cases.

(132) The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage, where the exclusive control and navigation of the ship are left with the master, mariners, and other servants of the owners, and the contract had been made with them only (*The Glengoil Steamship Co.* v. *Pilkington*, 28 S. C. R. 146).

the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person, who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes.

"Is there anything in the authorities which runs counter to the view I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading or as for a tort in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. No doubt a vessel may be chartered, and the charterer may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting, the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorised to make, binding the owner.

"The law seems to me to have been so settled for a very long time. The case of *Frazer* v. *Marsh* (1811), 13 East 238, which was decided so long ago as 1811, appears to me directly to bear out this view. In that case it was sought to render the registered owner liable for stores furnished to the vessel, the fact being that by a charter-party the vessel had been let for a certain number of voyages at a certain rent to the captain, who ordered stores for her use. Lord *Ellenborough* said: 'The Register Acts were passed *diverso intuitu;* but to say that the registered owner, who divests himself by the charter-party of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be to push the effect of those Acts much too far.' There your Lordships will observe that he does not rest the decision upon any doubt as to the person registered as owner being really the owner, inasmuch as under those earlier Acts the same security was not taken as is now taken to see that this was certain to be the case; but he rests his judgment upon the fact that the registered owner has divested himself of all control and possession of the vessel in favour of another, and that that person has all the use and benefit of it, and he puts the question to be determined thus, whether the captain in this instance

who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of liability, and he says that if he has so divested himself of the vessel and of its use and benefit as that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master. (133)

"What distinction is there between the case of stores and the case of liability in respect of any other matter which the master has a right to do on behalf of his owner, whoever he may be? I am at a loss to see any ground for the distinction. There is no authority for it, and I do not see any sound basis for it. A contract of affreightment is only like any other contract; and if you seek to render liable upon it some one who was not in name a party to it, you can only do so by establishing a relationship between the party making it and the party whom you seek to make responsible, which the law recognizes as creating that responsibility. No such relationship is established under the circumstances which exist here.

"In *Colvin* v. *Newberry* (1828), 8 B. & C. 166; in Ex. Ch., *Newberry* v. *Colvin* (1830), 7 Bing. 190; in H. L., *Colvin* v. *Newberry* (1832), 1 Cl. & F. 283, both in the Exchequer Chamber and in your Lordships' House, the law seems to have been regarded as I have submitted it to your Lordships to be. It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the shipowner and the charterer. But I do not gather from the judgment either in the Exchequer Chamber or in your Lordships' House that that was considered an essential part of the defendant's

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Canadian Cases.

(133) The defendant having advanced money to D. to build a ship, became the registered owner of three-fourths of the ship, as a security for his advances, with an agreement that she should be sold in England and his debt paid out of the proceeds of the sale. The ship being at St. John, and requiring repairs to enable her to go to England, D. and the master of the ship employed the plaintiff to do the work, directing him to charge it to the owners. The ship was sent to England and was sold, and the defendant got the proceeds. It was held that he was liable for the repairs (*Williams* v. *Wood*, 9 N. B. R. 362).

"Now, without doubt, as an abstract, unqualified proposition, to say that the registered owners of a ship were *primâ facie* liable for the price of repairs or outfit, in the port to which she belongs, where they have not personally contracted, and irrespective of the persons who have contracted, would, at the present day, be going too far; but to say that the defendant *Wood*, as a registered owner, would be liable in a case like the present, would be quite correct, when accompanied, as it was here, by an instruction to the jury as to the grounds of liability, and leaving it to them to draw the inference on which such liability would depend" (*Ibid*: *Parker*, J.).

case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel, who was in that case himself the person to whom the vessel had been let, might have been properly regarded by those who dealt with him as acting not merely on behalf of himself, but as acting on behalf of one owner or other, if they had not had notice that he was in fact at the time the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer Chamber or in your Lordships' House, was rested solely or mainly upon the fact that such notice existed.

"It is not necessary to refer to several cases which were cited before your Lordships. *The St. Cloud* (1863), Brow. & Lush. 4, *Hayn* v. *Culliford* (1878), 3 C.P.D. 410; (1879), 4 C.P.D. 182, and *Sandeman* v. *Scurr* (1866), L. R. 2 Q. B. 86, were all ordinary cases of charter-party where there was no pretence for saying that there had been any demise or anything in the nature of a demise of the vessel, but where the vessel had been chartered, the master of the vessel still remaining the servant of the owner.

"I have only to notice now the argument which has been based upon the Merchant Shipping Acts. Although the legislature has now taken greater security to see that the person registered as owner is properly registered than it had done before, all it has done is to make the register *primâ facie* evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it, by proving what the facts really are. But then Sir Walter Phillimore relies upon the subsequent legislation under which the defendant Furness is registered as managing owner. My Lords, it seems to me that in order to determine the effect of legislation one must look at the object which it had in view. I cannot think that this legislation altered in any way the liabilities or the rights of a person who was registered as the managing owner or who in fact was the managing owner, except so far as the legislature created new liabilities. It did, no doubt, create them, because it rendered the person registered as managing owner liable to penal consequences in case of the unseaworthiness of the vessel and his inability to prove that he had taken proper precautions. That burden it imposed upon him, and it was for the purpose of effectively carrying out the protection of the lives of those who went to sea on board British vessels, that this legislation was enacted. But beyond that it seems to me that it would be improper to impose any liability which the legislature has not by enactment clearly shewn its intention to impose. I do not see how, upon any sound or proper principle, it would be possible to do so" (*Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A. C. 8, at pp. 17—20: Lord *Herschell*, L.C.).

The Test is—Whose Servant or Agent is the Master when he Signs the Bill of Lading.

3. "Although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test is in each case that which was applied by the House of Lords in the case of the *Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A. C. 8—Whose servant is the master? Who is his undisclosed principal when he signs the bill of lading?" (*Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539, at p. 546: *Lindley*, L.J.). (134)

(d) Deviation.

See also *ante*, p. 499, Section XI.—End of Transit, (a) Delivery of Goods by Carrier.

(i.) In a bill of lading there is a contract for a particular voyage.

(ii.) If the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other.

(iii.) Ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. The vessel is only entitled to call at such ports in their geographical order.

Canadian Cases.

(134) The registered owner of a vessel is not liable for goods lost by the fraud or negligence of the master during a voyage, unless the master is employed by, or acting for him. Therefore, where defendant made advances to A. to enable him to build a vessel, and took the registry in his own name to secure his debt, but the vessel was sailed by A., and the defendant had no interest in her earnings, and did not employ the master, it was held, that the defendant was not liable for the goods lost through the negligence of the master (*Newbury* v. *Young*, 14 N. B. R. 148).

"The principal question in this case is, whether the registered owner of a vessel is liable for the negligence of the master, without any proof that he was employed by such owner? It was upon the ground of his being the registered owner, that the plaintiff sought to make the defendant liable; and if the case had rested on the plaintiff's evidence, we should have had no doubt as to what our decision should be; because the liability of the owner of a vessel in such a case does not depend upon the fact of ownership, but on the principles of law applicable to the case of master and servant; and whether the master was appointed by, or sanctioned by the owner, so as to make him his servant or agent" (*Allen*, J.: *ibid*).

"A fair and reasonable test to apply, is this: could the hirer have himself taken absolute control of the vehicle, horse, and harness, taking it altogether out of the possession of the driver"? (*The Consolidated Plate Glass Co.* v. *Caston*, 29 S. C. R. 627: Sir *Henry Strong*, C.J.).

(iv.) A deviation from reasonable necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires having regard to the interest of the shipowners and also of the cargo owners and to all other circumstances of the case.

The above rules of law will be found laid down and reasons for the same given in the following extracts cited in chronological order. (135)

No Unnecessary Delay—Usual and Customary Course.

1. "We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course" (*Davis* v. *Garrett* (1830), 6 Bing. 716, at p. 725: *Tindal*, C.J.).

Cases of Reasonable Delay.

2. "A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty" (*Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, at p. 237: *Willes*, J., delivering the judgment of the

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(135) Plaintiff shipped ninety barrels of flour at Port Credie, in a vessel of defendant's, to be carried to Quebec, the vessel being capable of carrying 4,500. She proceeded to Toronto, where she took in 400 barrels more; thence to Oswego, where 2,450 were shipped for Quebec also. She was wrecked near Oswego. Defendant held liable therefor, such deviation being beyond the established usages of trade (*Wright* v. *Holcombe*, 6 U. C. C. P. 531). See *post*, p. 674.

court (*Kelly*, C.B., *Martin*, *Channell* and *Cleasby*, BB., *Willes*, *Byles* and *Keating*, JJ.). (136)

3. A deviation for the purpose of saving life is justified; but a deviation for the sole purpose of saving property is not justified. See *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295.

There is a Contract for a Particular Voyage in every Bill of Lading.

4. "The next question is whether, assuming the bill of lading to contain the contract of carriage, the particular voyage on which the goods . . to be carried is part of the contract so contained. The bill of lading follows the usual form of such documents, and it seems to me clear that such form provides for a particular voyage. If the counsel for the defendants was right in his argument that there is no contract for any particular voyage in the bill of lading, just conceive what a state of things, in a business point of view, would result. The object of the carriage of the goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at that place for sale or use there acts upon the assumption that they will arrive there at or about a certain time in the ordinary course of a voyage there from the port of shipment. If the argument for the defendants were correct, he could not tell at what time he could calculate on having them. The indorsee of a bill of lading could not tell when he was likely to receive the goods. Business could not be carried on upon those terms. Again, with regard to the insurance of the goods, similar difficulties would arise. How could the goods be insured, if it was not known for what voyage they were to be insured? To suppose that there is no contract for a particular voyage in the bill of lading seems to me to be to disregard the whole course of mercantile business. It is obviously a most important part of the

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(136) "It cannot be doubted that the meaning of the contract of insurance for a voyage from one port or place to another, and thence to another, in other words for the voyage or voyages named in the policy, is that they shall be performed with reasonable diligence and without unnecessary delay, that is, with all safe, convenient and practicable expedition, and in the regular and customary track, and any unjustifiable deviation or delay discharges the underwriter from subsequent losses, because, if voluntary, or without necessity, it is the substitution of another risk and determines the contract" (*Reed* v. *Weldon*, 12 N. B. R. 463: *Ritchie*, C.J.).

Whether delay in a voyage is unjustifiable not, is a or question of law for the judge; but whether unreasonable or not, is a question for the jury (*Ibid.* See also *Reed* v. *Phillips*, 13 N. B. R. 172).

contract of carriage by sea that the route by which the goods are to be brought should be determined ; and accordingly it seems to me to be provided for in the bill of lading. The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, (137) and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described ? A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and courts of law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other. So here, if the description of the voyage had been merely from Fiume to Dunkirk, I think the contract would have been for a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk, and any departure from that track in the absence of necessity would be a deviation. Of course when I speak of the ordinary sea track I do not mean an exact line, for it would necessarily vary somewhat according to circumstances ; the ordinary track for sailing vessels would vary according to the wind ; the ordinary track for a steamer, again, might be different from that for a sailing vessel ; I mean the ordinary track of such a voyage according to a reasonable construction of the term. In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known

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(137) "The word 'port' is not used in the description of the risk, but may be implied in the expression 'at and from Sydney.' The term, however, in commercial documents, such as charter-parties and policies of marine insurance, has not a fixed meaning, but is to be considered as used in its popular or commercial sense, *i.e.*, as applying to what would be so understood by shipowners, shippers, and underwriters" (*The St. Paul Fire and Marine Insurance Co.* v. *Troop*, 26 S. C. R. 7 : *King*, J.).

sea-term ; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders ; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order ; and therefore the words 'in any order' are frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage. It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply ; and therefore the shipowners are responsible for the loss of the goods" (*Leduc* v. *Ward* (1888), 20 Q. B. D. 475, at pp. 480—482 : Lord *Esher*, M.R.). (138)

5. "The general law on the subject of deviation is not in controversy ; it can hardly be better expressed than in the words of Lord *Mansfield* in *Lavabre* v. *Wilson* (1779), 1 Dougl. 284, at p. 291.

"'A deviation from necessity must be justified, both as to substance and *manner*. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured.' (139)

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(138) Insurance on a ship "at and from St. John to a port of call, and discharge and loading in the West Indies, and from thence to a port of call and discharge in the United Kingdom." The ship sailed from St. John to Havana, discharged her cargo and then sailed to Matanzas, another port in the West Indies, when she took in a cargo and sailed for Cork, and was lost on the voyage :—*Held*, that going to Matanzas was a deviation. (*McGovern* v. *Provincial Insurance Co.*, 8 N. B. R. 311, and 9 N. B. R. 64).

In September, 1882, a vessel sailed from Liverpool, G. B., for Bathurst, N. B., to load lumber under charter. Having sustained damages on the voyage she was taken to St. John, N. B., for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst :—*Held*, that taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover" (*Cassels* v. *Burns*, 14 S. C. R. 256).

(139) If a carrier bargain to carry in a named vessel to a named port, and the vessel became disabled or detained long beyond the usual period by adverse winds, etc., loss of market cannot be recovered, but when the loss of

"I cannot find that those words have ever been criticized. They are adopted in the latest editions of the text-books on the subject.

"Another proposition, which seems equally well-established, is that where there is upon the evidence a question whether what the captain did was necessary under the circumstances that question is proper to be determined by the jury (*Motteaux* v. *London Assurance Co.* (1739), 1 Atk. 545; *O'Reilly* v. *Gonne* (1815), 4 Camp. 249).

"Without attempting any exhaustive definition of what amounts to necessity in such cases, I think it may fairly be said necessity does not mean absolute physical necessity only, but a reasonable necessity having regard to the interest of the shipowners and also of the cargo-owners and to all the other circumstances of the case" (*Phelps, James and Co.* v. *Hill*, [1891] 1 Q. B. 605, at p. 617: *Kay*, L.J.).

(e) Expansion of Exceptions in a Bill of Lading by the Charter-party.

"There are many cases as to what is brought into the bill of lading by this general reference to the charter-party ['other conditions as per charter-party']. It brings in only those clauses of the charter-party which are applicable to the contract contained in the bill of lading; and those clauses of the charter-party cannot be brought in which would alter the express stipulations in the bill of lading" (*Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154, at p. 157: *Brett*, M.R.).

"*All Other Conditions as per Charter-party.*"

The expression "paying freight for the said goods and all other conditions as per charter-party," is meant to bring in only those conditions which will apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying and so on, but it is by no means to be taken to incorporate all the conditions of the charter-party.

1. "In *Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163, one of the questions was, whether the exception contained in the bill of

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market arises from a transmission to a wrong point the rule stated does not apply (*Monteith* v. *Merchants' Despatch Company*, 1 O. R. 47). "I assume it to be law that damages for the fall in the market value are recoverable as between parties generally dealing in the buying and selling of the article where the vendee by the vendor's default is unable to obtain possession or control of the article purchased. I also think the carrier is liable for loss by fall in market value where the damage is caused not by delay in ocean or other transit, but by wrongful delivery at a wrong point and detention arising therefrom" (*Hagarty*, C.J.: *ibid.*).

lading was expanded by the exception in the charter-party. The exception in the bill of lading was the 'act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted.' The exception in the charter-party was the 'act of God, enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, excepted.' After the exception in the bill of lading were the words, 'paying freight for the said goods, and all other conditions as per charter-party.' *Willes*, J., in giving judgment, said [at p. 177]: 'We now proceed to dispose of the second [point], which is, whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words 'and other conditions as per charter-party,' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with that previously mentioned, viz., payment of freight,—*conditions to be performed by the receiver of the goods*. It is a mere question of language and construction; and, we think it enough to say that the latter is the construction which we put upon these words.' Here is a distinct decision of *Willes*, *Byles*, and *Keating*, JJ. If this case has not been overruled, and there is no other case inconsistent with it, it remains law, and governs the present case. It was suggested that *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522, is inconsistent with it. It is not in any way inconsistent. *Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163 was cited in argument, but was not referred to in any of the judgments. *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522 was in the Exchequer Chamber, and was decided in 1871; *Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163, in 1864. It is scarcely conceivable that *Willes*, J., who concurred in the judgment given by *Brett*, J., describing it as a judgment written with such fresh and accurate acquaintance with the mercantile and maritime law applicable to the subject, that he would not attempt to add anything to it, should have forgotten his previous decision which had been cited before him, or meant to overrule it, or thought the case he was then deciding inconsistent with it. *Russell* v. *Niemann* is entirely in accordance with *Gray* v. *Carr* (1871), L. R. 6 Q. B. 522 . . . I will only add that *Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163, was recognized and approved of in *Taylor* v. *Perrin*, an unreported case in the House of Lords, the shorthand writer's notes of which I have seen. Lord *O'Hagan* described *Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163 as a perfectly well-decided case. Lord *Blackburn* said: 'The case which has

been referred to (*Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163) in which *Willes*, J., gave judgment, as it appears to me perfectly correctly decided that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charter-party'" (*Serraino and Sons* v. *Campbell*, [1891] 1 Q. B. 283, at pp. 292—295: *Lopes*, L.J.).

2. "Now, there is a body of authority which has established conclusively that the words in a bill of lading, 'they paying freight for the goods and all other conditions as per charter-party,' do not incorporate all the conditions of the charter-party, but only those conditions 'which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo such as payment of demurrage, the payment of freight, the manner of paying, and so on.' These are not my words, but the words of Lord *Blackburn* in the House of Lords in *Taylor* v. *Perrin* [an unreported case, see *supra*]. It would be mere waste of time to go through all the cases upon this question, especially as this was done by the late *Kay*, L.J., in this court in the year 1890 in the case of *Serraino* v. *Campbell*, [1891] 1 Q. B. 283 . . . If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority, from the House of Lords downwards to the court of first instance, it is this" (*Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q. B. 150, at pp. 153, 154: A. L. *Smith*, L.J.).

(f) Form of a Bill of Lading.

SHIPPED in good order and condition by *A.B.*, in and upon the good ship called *The Foam*, whereof *C.D.* is master, now riding at anchor in the *River Thames* and bound for *Barcelona*, *in Spain*, 20 *bales*, *containing* 100 *pieces of broad cloth*, marked and numbered as per margin; and are to be delivered in the like good order and condition at *Barcelona* aforesaid (the act of God, the Queen's enemies, restraint of princes and rulers, fire and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto *E.F.* or to his order or assigns, he or they paying for the said goods per *piece* freight, with primage and average accustomed. IN WITNESS whereof the master or purser of the said ship hath affirmed to 3 bills of lading of this tenor and date one of which bills being accomplished the others are to stand void.

Dated at *London*, the day of , 1900.

(g) Bill of Lading, its Office, Nature, and what it is Evidence of.

(i.) The primary office and purpose of a bill of lading is to express the terms of the contract between the shipper and shipowner.

(ii.) Where there is a charter-party, as between the shipowner and the charterer, the bill of lading may be merely in the nature of a receipt for goods.

(iii.) Where the bill of lading differs from the charter-party, as between the shipowner and the shipper, at least the charter-party is binding.

(iv.) Where the bill of lading differs from the charter-party and is endorsed over, as between the shipowner and the indorsee, the bill of lading must be considered to contain the contract.

(v.) Where there is no charter-party, as between the shipowner and the grantee of the bill of lading, the bill of lading is evidence of the terms of the contract for the carriage of the goods received by the master. (140)

The principles above expressed seem to be established by the following judicial rationale:

1. "It [a bill of lading] is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance goods shipped under a charter-party, and a bill of lading differing from the charter-party; as between shipowner and shipper at least the charter-party is binding: *Gledstanes* v. *Allen* (1852), 12 C. B. 202" (*Sewell* v. *Burdick* (1884), 10 App. Cas. 74, at p. 105: Lord *Bramwell*; cited by *Manisty*, J., in *Rodoconachi* v. *Milburn Brothers* (1886), 17 Q. B. D. 316, at p. 320). (141)

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(140) A box was put on board the defendant's steamer, some of the men employed on the steamer assisting to carry it on board. It was not delivered to any officer of the boat, but as the steamer was starting, a bill of lading for it was handed to the purser. The box being lost, it was held that defendant was liable, for the bill of lading was notice that the shipper considered the box as being on board, and this should have been ascertained after the steamer had sailed (*Howland* v. *Bethune*, 13 U. C. Q. B. 270; see also *Beard* v. *Steele*, 34 U. C. Q. B. 53).

(141) In an action for the recovery of the freight and a quantity of iron, carried in plaintiff's ship from London to St. John, it appeared that the iron was shipped by D. C. and Co., of England, who received from the master the usual bill of lading, in which the goods were made deliverable to the order of D. C. and Co. on paying freight. On arrival of the ship in St. John, defendant, to whom the bill of lading had been sent, claimed the iron as his

2. "It is true that, where there is a charter-party, as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charter-party; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods. Where there is no charter-party, as between the grantee of the bill of lading and the shipowner, the bill of lading is no doubt a receipt for the goods, and as such, like any other receipt, it is not conclusive, for it may be controverted by evidence shewing that the goods were not received; the question whether it will be more than a receipt as between the shipper and shipowner depends on whether the captain has received the goods, for he has no authority to make a contract of carriage to bind the shipowner, except in respect of goods received by him. If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner. But, if the goods have been received by the captain, it is the evidence in writing of what the contract of carriage between the parties is; it may be true that the contract of carriage is made before it is given, because

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own, and explained to plaintiff that D. C. and Co. had omitted to indorse the bill of lading. He also tendered the freight. Plaintiff still declined to deliver the goods without an indorsed bill of lading. The iron, however, was landed on the wharf, and it was shown that one J., a tide waiter, weighed it by defendant's direction, and it was hauled to the railway station by one C., who was paid for the hauling by defendant. Subsequently the plaintiff rendered a bill for the freight to defendant, who replied that he had tendered the freight:—*Held*, that under these circumstances, the jury were justified in finding an implied contract on defendant's part to pay the freight (*Ferguson* v. *Domville*, 19 N. B. R. 576).

"When a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration (*The North-Western Transportation Co.* v. *McKenzie*, 25 S. C. R. 47). When a party to a transaction receives a customary document under circumstances which, by the ordinary usage of business would ordinarily lead him to infer that it forms a record of the contract, he cannot very well, in ordinary circumstances, escape from its binding operation (in the absence of fraud or mistake) merely upon the ground that he did not read it. But the like conclusion does not follow when it is sought to vary terms of a prior mutual assent by a formal document given out of the usual course of business" (*King*, J.: *ibid.*, *ante*, p. 597).

it would generally be made before the goods are sent down to the ship: but when the goods are put on board the captain has authority to reduce that contract into writing: and then the general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract. In the case of *Fraser* v. *Telegraph Construction Co.* (1872), L. R. 7 Q. B. 566, at p. 571, *Blackburn*, J., held that a bill of lading must be taken to be the contract under which the goods were shipped. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, I expressed the same view that I am now expressing as to the nature of a bill of lading. In *Glyn, Mills and Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, Lord *Selborne* said, at p. 596, 'Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner.' The terms of the Bills of Lading Act [1855 (18 & 19 Vict. c. 111)] shew that the legislature looked upon a bill of lading as containing the terms of the contract of carriage" (*Leduc* v. *Ward* (1888), 20 Q. B. D. 475, at pp. 479, 480: Lord *Esher*, M.R.).

Three Bills of Lading.

"*One of which bills being accomplished the others are to stand void.*"

(i.) It is for the benefit of the shipper or of the consignee that there are three parts of a bill of lading.

(ii.) It is for the benefit and security of the shipowner that the words above are inserted in a bill of lading,

(iii.) The first copy of the bill of lading, properly indorsed for value, with an intent to pass the property passes the property, no other copy of the bill of lading subsequently indorsed has any effect in passing the property at all.

(iv.) It is for the assignee to give notice of his title to the shipowner.

(v.) The true owner of the goods can sue the person into whose possession the goods go; yet he cannot sue the captain or the shipowner who delivers the goods to anyone else upon a

subsequent copy of the bill of lading fraudulently indorsed by the consignor. (142)

Canadian Cases.

(142) The plaintiffs, a banking company doing business at Charleston, S. C., were assignees of a bill of lading for one hundred casks of spirits of turpentine, and five hundred and one barrels of rosin, for which they had discounted the shipper's draft on R., of St. John, N. B., the consignee. They forwarded the draft to their agents with instructions to deliver the bill of lading to R. when the draft was paid. The draft was dated August 2nd, 1875, and was payable twenty days after date. R. accepted the draft, but did not pay the same, and the bill of lading was retained by plaintiffs' agents. The invoice was sent from Charleston to R., to whom the captain of the vessel by which the goods were shipped, delivered the goods without the production of the bill of lading.

Subsequently R. delivered ninety barrels of the turpentine to the defendants, who were auctioneers, for the purpose of being sold by the defendants on account of R., upon which they advanced to R. 1,000 dollars. The defendants, after advertising the sale, sold the goods at public auction, and paid the balance of the net proceeds to R. on September 24th, 1875. The turpentine had been taken out of the vessel and landed and warehoused several days before delivery to defendants, and defendants did not know that R. had not possession of the bill of lading until October 21st, 1875, when the plaintiffs, by notice in writing, demanded the turpentine of them :—*Held*, that plaintiffs were entitled in an action of trover to recover from defendants the value of the turpentine (*People's National Bank* v. *Stewart*, 19 N. B. R. 268).

"The property, previous to being shipped, was in C. He was under no obligation to transfer it to R. The fact of R. writing him to purchase the goods, and draw on him for amount of invoice, gave R. no property in the goods. C. owning, had a perfect right to say he would ship the goods, drawing on R. for amount of invoice, and retain his property in them until the amount of invoice was paid. On the other hand, R., when the bill was presented for his acceptance, had a perfect right to decline accepting it until he should get the bill of lading. C. protected his property by withholding the bill of lading, which he had a right to do ; and R. thought proper to accept the bill of exchange without getting the bill of lading, which he need not have done. By the bill of lading C. controlled the possession of the captain, and made him accountable to deliver the goods according to its terms—it was the symbol of property, and the holder retained the property of the goods in himself. It was not inconsistent with the statement in the invoice that the goods were shipped by order of and on account of R. The *jus disponendi* was still reserved to the shipper through the medium of the bill of lading. Having this property and control of possession, C., by indorsement of the bill of lading, transferred it to the plaintiffs, together with the then unaccepted draft on R. By this they became the absolute owners of the goods, and could deal with them as they pleased. It was competent for them to permit the goods to go into R.'s possession on his acceptance of the draft, or to hold their property in them until they were paid for, and they adopted the latter course by forwarding the draft to the Shawmut Bank, of Boston, taking the precaution of instructing them not to part with the bill of lading until the draft was paid. Several other cases were cited on the argument tending to a confirmation of the doctrine that the shipper or indorsee of the bill of lading hold the right to the goods shipped under it" (*ibid.* : *Witmore*, J. *In re Coleman*, *ante*, p. 598 ; *Wisconsin Marine Co.* v. *Bank B. N. A.*, 21 U. C. Q. B. 284).

These propositions are in accordance with the authorities next referred to.

1. "It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that 'the one of these bills being accomplished the others are to stand void.' It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bonâ fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice indeed that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry. This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those in your Lordships' House in *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321, and *London and County Banking Co.* v. *Ratcliffe* (1881), 6 App. Cas. 722, at p. 729" (*Glyn, Mills & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, at p. 596: Lord *Selborne*, L.C.).

2. "But the confusion, the difficulty, and embarrassment have arisen from there not being what I have supposed, one title deed, but there being more than one, in this case three parts of the title deed, that is to say of the bill of lading. I asked the question, For whose benefit is it that there are those three parts? certainly not for the benefit of the shipowner, or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to inquire whether to them it is really a benefit or whether at this time of day (many if not all of the reasons for having bills of lading in parts being very much modified) it

would not be better for every one that there should be only one part; that is a question for the mercantile world to consider. It is quite sufficient for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading" (*ibid.*, at p. 599: Earl *Cairns*).

3. "I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be [the] holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues, it is of vast importance not to unsettle the principles which have been already settled; and when a new case has to be decided it is desirable to be very cautious as to what principles are applied (*ibid.*, at p. 605: Lord *Blackburn*).

4. "Now the House of Lords, as I understand the case of *Glyn, Mills & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, distinctly stated that the old law with regard to the passing of property by bills of lading was not altered, and that the first copy of the bill of lading, properly indorsed for value, with an intent to pass the property, passed the property, and that no other copy of the bill of lading subsequently indorsed would have any effect in passing the property at all. They held only that although the true owner of the goods could sue the person into whose possession the goods had gone, because the goods were his, yet that he could not sue the captain or the shipowner; because when he took the property in the goods by virtue of the indorsement of the first copy of the bill of lading, he took it subject to this contingency, that if the goods were delivered by the captain to anybody else upon a subsequent copy of the bill of lading fraudulently indorsed by the consignor, he could not sue the shipowner, but he could sue anybody else who dealt with the goods which were his property" (*Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, at p. 335: *Brett*, M.R.).

(h) Masters' Authority at Common Law to give and sign Bills of Lading.

(i.) A master's signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the master's principal the onus of falsifying them. (143)

(ii.) A master has a general authority to make contracts to carry goods on freight, but not to bind his owners by a contract to carry freight free. If he has a more limited authority shippers must be informed of it.

(iii.) A bill of lading ought not to be signed until the goods are on board.

(iv.) A master has no right to give and sign bills of lading for goods not on board.

(v.) A bill of lading is *primâ facie* evidence of the quantities of goods shipped.

(vi.) A master has a general authority to sign a bill of lading and acknowledge the nature, quality, and condition of the goods *shipped*.

1. "He [the master of a ship] may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So, with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods. Constant usage shews that masters have that general authority; and, if a more limited one is given, a party not informed of it is not affected by such limitation. 'The master is a *general agent* (144) to perform all things relating to the usual

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Canadian Cases.

(143) "The master is the proper person to sign a bill of lading, both by custom and by statute, for he is the principal in charge, and represents the owner or affreightor of the vessel; but if he is not on board, the officer in charge may give receipts for freight and instruments of that nature" (*Royal Canadian Bank* v. *Carruthers*, 28 U. C. Q. B. 578).

(144) Defendant's vessel was chartered to R. and Co. to carry a cargo of lumber from Annapolis, N. S., to ports in South America at a stipulated price per thousand. The charter-party contained the two following clauses: (*a*) "Bills of lading to be signed at any rate of freight without prejudice to this charter-party, but not less than the chartered rate." (*b*) "It is agreed that the charter-party is entered into by the charterers for account of another party; their responsibility ceases as soon as the cargo is on board, the vessel holding an absolute lien for all freight, dead freight and demurrage." The master, claiming that the lay days provided by the charter-party for loading had been exhausted, and that the ship was entitled to be paid demurrage, refused to sign the bills of lading when they were presented to him, or to give up the cargo, except upon payment of the demurrage demanded:—*Held*, that the master was bound either to sign the bills of lading or to give up the cargo, and that his refusal to do so was a breach of the charter-party:—*Held*, also,

employment of his ship: and the authority of such an agent to perform all things *usual in the line of business in which he is employed*, cannot be limited by any private order or discretion not known to any party dealing with him' (Smith's Mercantile Law, p. 59). Is it then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for, all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until the goods are on board; for, it begins by describing them as *shipped*. It was not contended that such a course is usual. In *Lickbarrow* v. *Mason* (1787), 2 T. R. 63, *Buller*, J., says, at pp. 75, 76, 'A bill of lading is an acknowledgment by the captain, of having received the goods on board his ship: therefore, it would be a fraud in the captain to sign such a bill of lading, if he had not received the goods on board; and the consignee would be entitled to his action against the captain for the fraud'" (*Grant* v. *Norway* (1851), 10 C. B. 665, at pp. 687, 688: *Jervis*, C.J. See also *Cox* v. *Bruce* (1886), 18 Q. B. D. 147, at pp. 151, 152: Lord *Esher*, M.R., *post*, pp. 628, 629).

2. "We think that, when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner" (*Hubbersty* v. *Ward* (1853), 8 Ex. 330, at p. 334: *Pollock*, C.B.).

3. "My Lords, the first question to be considered is whether there was evidence that the cargo shipped was to the extent only of the quantity found to be in the ship on her arrival at Aberdeen. On this point your Lordships entertained so clear an opinion at the close of the argument of the appellants, that you did not require any answer on the part of the respondent. It was contended, and properly contended, by the learned counsel for the appellants that the bills of lading signed by the master were *primâ facie* evidence that the quantities of bones mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship. And though he has no authority to sign bills of lading for

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Canadian Cases.

that the bills of lading tendered for signature gave the owners a lien on the cargo for all demurrage legally payable under the cesser clause of the charter-party:—*Held*, also, that neither plaintiffs nor the consignees were liable to pay demurrage at the port of loading before the cargo was put on board, and that the only parties the owners could look to were the original charterers, who were not discharged from such liability by the cesser clause (*Forsyth* v. *Sutherland*, 31 N. S. Reps. 391; *Erb* v. *G. W. Rail. Co.*, 3 O. A. R. 446).

a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent" (*McLean and Hope* v. *Fleming* (1871), L. R. 2 H. L. Sc. 128, at p. 130: Lord *Chelmsford*). (The latter part of this extract was cited by Lord *Watson*, in *Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70, at p. 73.)

4. "In the particular case with which your Lordships have to deal there is a receipt [a bill of lading]—I am using now popular words, because I do not think the particular form in which this question arises ought to weigh much upon one's attention; it is a receipt for goods—that is what it amounts to—given by the person who was authorized to give the receipt for the goods for the express purpose of making evidence against the person who received them. Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that, without explanation and without shewing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is that unless displaced by evidence, unless some such topic as that is suggested, the ordinary result follows that the thing which was done as an acknowledgment of the receipt must have its due effect given to it. In truth, if that were not so, it would be impossible to conduct business at all. It is true that in the case of this class of mercantile documents [bills of lading], which has a force and effect of its own and involves the rights of other people, it is more important to assert what I have been suggesting than in the case of other documents" (*Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70, at pp. 75, 76: Lord *Halsbury*, L.C.).

5. "The rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel (145); but, when he signs a bill acknowledging the receipt of a

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Canadian Cases.

(145) It is not within the scope of a freight agent's authority to give false and fraudulent receipts for goods when none were in fact received (*Oliver* v. *Great Western Rail. Co.*, 28 U. C. C. P. 143). *Semble*, that the Act 33 Vict. c. 19, s. 3, did not apply, as the receipt did not represent the goods to be shipped on board the train, but merely as having been received to be sent.

"I think it is clear law that the bailor who has his goods delivered to the master of a vessel to be carried for freight, has the personal liability of the master that this will be properly done, as well as that of the owner. If the

specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can shew that the whole or some part of it was in fact not shipped. If the owner is able to satisfy that onus, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder" (*ibid.*, at p. 77 : Lord *Watson*).

(i) Bills of Lading Act, 1855.

(18 & 19 Vict. c. 111.)

An Act to amend the Law relating to Bills of Lading.

[14th *August* 1855.]

WHEREAS, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the *property in the goods* may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner ; and it is expedient that such rights should pass with the property : And whereas it frequently happens that the goods in respect of which bills of lading purport to be

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Canadian Cases.

shipper takes no bill of lading, the liability of the master is that of a common carrier ; and with a bill of lading, it is that of a common carrier controlled by the contract in it, and the person shipping the goods and taking the bill of lading has the option to bring his action on the direct promise in the bill of lading, or upon the common law liability in *tort* ; and no person other than the person to whom the promise in the bill of lading is made can bring an action on it ; for, although the contract is upon its face a promise to deliver to the promisee's assigns, yet the contract itself is not assignable" (*Busby* v. *Winchester*, 27 N. B. R. : *Palmer*, J., at p. 240).

[Since the passing of 52 Vict. c. 30 (D.), bills of lading may be assigned, and the reference of *Palmer*, J., to the assignment of bills of lading is not now law. See *Murton* v. *Kingston*, *ante*, p. 598.]

"Although masters of ships are the agents of the owners, or rather, the persons who have the control, and who direct the ship in respect to the usual employment of the ship, and as such have authority to bind them, yet, even in contracts of that nature, he is different from an ordinary agent, for he is personally liable on all such contracts, the person dealing with him taking the option either of suing him or the owners—he cannot hold both. This would be the rule respecting contracts, but with reference to torts, or with reference to breach of duty in the master, there never was any need of stretching the common law rule, for both principal and agent are separately or jointly liable, and, consequently, actions have constantly been brought against the master and owners for the negligent carrying of goods, by the vessel being improperly loaded, whereby the consignee's goods were injured, or when he had not taken care of them, by which they were lost ; in fact, for every breach of duty that a carrier owed to the owners of the goods" (*Palmer*, J. : *ibid.*, at pp. 240, 241).

signed have not been laden on board, and it is proper that such bills of lading in the hands of a bonâ fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

All Rights of Suit and Liabilities Transferred to Consignee or Endorsee. (146)

Section 1. (147) Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom *the property in the goods* therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have *transferred to* and vested in him all rights of *suit*, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

[N.B.—The words printed in italics are, of course, not so printed in the copy of the Queen's printers; it is merely to call special attention to them that they are here so printed.]

Saving of Right to Stop in Transitu and to Freight Unaffected.

Section 2. (148) Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Canadian Cases.

(146) The transfer of a bill of lading for value *primâ facie* transfers the whole property in the goods mentioned in the bill, but the effect of this transfer is always subject to be controlled by the intention of the parties (*Morton* v. *McLeod*, 1 Russell and Chesley, N. S. Reports, 71).

(147) AN ACT RELATING TO BILLS OF LADING.
(52 VICT. c. 30 (D)).

1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or indorsement, shall have and be vested with all such rights of action, and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

(148) 2. Nothing in this Act contained shall prejudice or affect any right of stoppage *in transitu*, or any right of an unpaid vendor under the Civil Code of Lower Canada, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence

Bill of Lading Conclusive Evidence of Shipment except in Certain Cases.

Section 3. (149) Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been

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Canadian Cases.

of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

"The law merchant sanctions the transfer of property *in transitu*, by a mere indorsement and transfer of the bill of lading. If property can be thus informally transferred by the consignor to another, I see no reason why the cancelling of the indorsement and redelivery of the bill of lading to the consignor should not revest the property in him" (*Stalker* v. *Weir*, James' N. S. Reports, 248: *Halliburton*, C.J.).

(149) 3. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel or train shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper, or of the holder, or of some person under whom the holder claims.

"The course of business which seems to have been adopted in every instance was for Brown and Co.; upon receiving a bill of lading or shipping receipt, to draw on the plaintiffs for an advance on the consignment; negotiating the draft with the voucher attached, through a bank at Chatham, by whom it was in due course presented to the plaintiffs for acceptance, and accepted by the plaintiffs on the faith of the accompanying voucher. This is the mode in which a very large proportion of the business of the country is transacted, as is well known to business men. It is the subject of legislative recognition, the statute of Canada on the subject (31 Vict. c. 11) giving legal effect to the indorsement of documents of the class, including any bill of lading or any receipt given by a carrier for cereal grains, goods, wares, or merchandize delivered to any carrier for carriage from any place whatever to any part of this Dominion; following the earlier legislation of the Province of Canada, which may now be found in R. S. O., c. 116 [now R. S. O. 1897, c. 145, which is substantially the same as the Dominion action, 52 Vict. c. 30], s. 13, etc. Section 5 [s. 5 is now 52 Vict. c. 30 (D)] of the same chapter of the Revised Statutes contains the provision of the Ontario statute, 33 Vict. c. 19, which followed the Imperial Act, 18 & 19 Vict. c. 111, but applied to bills of lading representing goods to have been shipped on board a vessel *or train*, while the Imperial Act mentioned only a vessel."

"We must take it to be the fact that a warehouseman or carrier giving a receipt or bill of lading such as our statute makes negotiable as representing the goods, and in view of the mode of moving produce by means of advances obtained on those securities, gives it not only with the knowledge that it may be acted upon, but with the intent that it shall be acted upon" (*Erb* v. *Great Western Rail. Co.*, 3 O. A. R. 446: *Patterson*, J.A.).

shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

The Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111), *applies only to Transactions where the Property in the Goods Passes and not, therefore, to Pledges.*

"That statute [the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111)] means an actual vesting of the property as by bargain and sale, because it begins by a recital that 'by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods *may* thereby pass to the indorsee' —not that in every case it does pass, and then the first section relates to transactions in which the property has passed" (*Fox* v. *Nott* (1861), 6 H. & N. 630, at pp. 637, 638: *Martin*, B.).

"I agree with my brother Martin that the Act [the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111)] applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight. The second section expressly provides that nothing in the Act shall prejudice or affect any right to claim freight against the original shipper or owner" (*ibid.*, at p. 640: *Wilde*, B.).

As to pledge of a bill of lading, see *post*, p. 631; *Sewell* v. *Burdick* (1884), 10 App. Cas. 74.

"*Weight, Contents, and Value Unknown*"—*Carrier Liable as Carrier whatever the Contents may be.* (150)

1. "It is clear upon the authorities cited [*Grant* v. *Norway* (1851), 10 C. B. 665; *Hubbersty* v. *Ward* (1853), 8 Ex. 330] that, but for the recent statute (18 & 19 Vict. c. 111), the defendants [charterers] would not be liable; for a due delivery has been made of the whole of the manganese which was shipped at

Canadian Cases.

(150) The Bill of Lading Act, 33 Vict. c. 19 (O.) [now R. S. O. 1897, c. 145, s. 5], creates no estoppel as to the condition in which goods are when shipped (*Chapman* v. *Zealand*, 24 U. C. C. P. 421).

Genoa. But it is said that, under the Act, the plaintiff, who is the *bonâ fide* holder for value of the bill of lading, is entitled to recover for the whole amount stated in it, independently of the quantity actually shipped. Looking at the bill of lading alone, it might be questionable whether, independently of the question on the statute, the defendants could be liable. For the written part of the bill is not entirely inconsistent with the printed. The whole may be reasonably and fairly read as meaning, that a quantity of manganese had been received on board, appearing to amount to 33 tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight.

"But I do not rest my judgment on this ground. We are called upon for the first time to put a construction on this statute, and it is fit that we should state our opinion as to its effect with reference to the character of the party signing the bill of lading, where an action is brought against the owner or charterer. The preamble of the Act recites that, 'it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid;' and in conformity with this language the enacting words of s. 3 are, that 'every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped' . . . and if this action had been against the master, the point raised by the plaintiff might have been material; but being neither against the master, nor against the person actually signing the bill of lading [the defendants were charterers] it entirely fails" (*Jessel* v. *Bath* (1867), L. R. 2 Ex. 267, at pp. 271, 272: *Kelly*, C.B.).

2. "The cases cited in Parsons on Shipping, 198, and especially *Clark* v. *Barnwell* (1851), 12 How. 272, shew the meaning of such a memorandum as this stamped on the bill of lading by the captain before he will sign it ['Weight, value, and contents unknown,']. When a closed case is offered to him with a representation as to the nature of its contents on the bill of lading he may accept it without alteration of the bill of lading; but if he alters the bill of lading by inserting a statement that the contents are unknown, it is clear, as a matter of business and it seems from the American cases, and *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267, to be the law, that he thereby declines to accept the declaration of the shipper; he

says in effect, 'I accept this case as it appears on the outside; I know nothing about the inside, and will be bound by no statement in reference to it.' It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package, but the carrier undertakes in his capacity as carrier to carry the case whatever it contains. If so, he must be liable as a carrier upon his contract for non-delivery of the goods whatever they were, really contained in the case. Whether he is liable to the value of the goods really contained in the case, or only to the value of such goods as they were represented to be by the shipper is a question not now before us, and one on which I would rather express no opinion, though at the same time I do not wish to be considered as intending to differ from my Lord's [*Bovill*, C.J.'s] suggestion that the carrier in such a case may be liable only to the value of the goods as they were represented to be . . .

"It was further contended on behalf of the defendants that the representation of the plaintiffs as to the contents of the package created an estoppel, because the position of the shipowner was thereby altered. It was laid down in the case of *Walker* v. *Jackson* (1842), 10 M. & W. 161, at p. 169, by Lord *Wensleydale*, who was certainly a master in the art of laying down general propositions of mercantile law, that as a general rule 'if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary: if he ask no questions, and there is no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry it as it is,' *i.e.*, to carry it as a carrier. In point of fact no question was here asked by the shipowners on the shipment of the goods. There was only a statement by the shippers on the bill of lading which they, the shipowners, refused to accept. The case, therefore, comes within the rule so laid down in *Walker* v. *Jackson* (1842), 10 M. & W. 161, and that case shews that the real contract was that the defendants should carry as carriers whatever was in the packages" (*Lebeau* v. *General Steam Navigation Co.* (1872), L. R. 8 C. P. 88, at pp. 96, 97: *Brett*, J.). See also, *ante*, pp. 382—387 and p. 428.

Master Signing for More Goods than Delivered—Signature meant by the Bills of Lading Act, 1855.

"I do not understand the judge in *Jessel* v. *Bath* (1867), L. R. 2 Ex. 267, when they say that the bill of lading binds only

the person who actually signs it, to mean that it must be the manual signature of the party, because if a man authorizes another to sign his name, he is equally bound as if he had signed it himself. But the authority given to the master here was, not to sign the name of his owners, but to sign for himself, though to sign an unusual bill of lading. The statute means, I think, the signature of the name of the person who is intended to be bound. It seems to me therefore, that, although the plaintiffs authorized the master to sign these bills of lading, there is no estoppel as between them and the consignees either at common law or by the statute, (150) and no binding of them by the bill of lading; and that they were not bound to deliver to the consignees a greater amount of cargo than they actually received on board" (*Brown* v. *Powell Coal Co.* (1875), L. R. 10 C. P. 562, at p. 568: *Brett*, J.).

The Master has no Authority to Estimate, Determine and State on the Bill of Lading, so as to Bind his Owners, the Particular Mercantile Quality of the Goods before they are put on Board.

"It is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant* v. *Norway* (1851), 10 C. B. 665. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill

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Canadian Cases.

(150) *Ante*, p. 625

of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do . . . . Furthermore, I doubt very much whether the indorsee, being placed by the Bills of Lading Act in the same position as if the contract between the shippers and shipowners had been made with him, can stand for this purpose in any different position from that of the shipper" (*Cox* v. *Bruce* (1886), 18 Q. B. D. 147, at pp. 151, 152: Lord *Esher*, M.R.).

Special Provision making Bill of Lading conclusive as to Quantity of Goods.

In the absence of fraud, a provision in the bill of lading that the bill of lading shall be conclusive evidence against the master's principal of the quantity of cargo received as stated therein, estops the latter from showing that the quantity stated to have been shipped was not really put on board. (151)

"A bill of lading was signed by the captain stating that a certain quantity of timber was 'shipped,' the meaning of which must be that it was delivered to the ship and put on board. If there had been no special provision to the contrary, that statement in the bill of lading would have been as against the shipowner only *primâ facie* and not conclusive evidence of the amount actually shipped, and he might have proved that a less quantity of timber was shipped. . . . . The provision is that the bill of lading is to be conclusive evidence of the quantity of cargo received as stated therein. How is any quantity stated to have been received by a bill of lading? By the word 'shipped' of course. What can be the meaning of such a provision but to get rid of the liberty of the shipowners to shew that the quantity stated to have been shipped was not really put on board and to make the bill of lading an estoppel? The provision is a good business provision for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side. Of course, if there were fraud, such a provision would not take effect, for fraud overrides all such provisions. In the absence of fraud such a provision is meant to cover all *bonâ fide* mistakes. It cannot be pretended here that

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(151) A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped, has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped (*The N. W. Transportation Co.* v. *McKenzie*, 25 S. C. R. 38).

there was any want of *bona fides* on the part of the charterers or the shippers' agents. It was urged that there was no mistake, because the captain knew and the shippers' agents knew that the full quantity of timber had not been put on board the ship. But the very object of this provision is to get rid of disputes as to what happened between distant agents such as these, or the clerks of such agents. There is no ground here for any suggestion that the charterers knew or must be taken to have known that the whole quantity was not shipped" (*Lishman* v. *Christie* (1887), 19 Q. B. D. 333, at pp. 337, 338, 339: Lord *Esher*, M.R.).

Authority of Ship's Broker. (152)

"It is, in my opinion, a settled and a salutary principle of mercantile law that the mere employment of a broker, at a foreign port, to find a cargo for a ship, and to adjust the terms upon which it is to be carried, does not give him implied power to relieve the master, who signs bills of lading, of his legal duty to the shipowner. I do not doubt that, according to the ordinary course of business, the broker so employed prepares the bills of lading, because they contain the terms of the contract of carriage; and these are matters as to which he is the sole representative of the shipowner, and with which the master has no concern. But the fact of the shipment of the goods to be carried, and the date of shipment, are matters within the province, not of the broker, but of the master; and when he certifies them, as the accredited agent of the shipowner, it is his duty to do so carefully and to the best of his knowledge, and he has no right to delegate that duty to other agents appointed for other purposes by his employer" (*Stumore, Weston & Co.* v. *Breen* (1886), 12 App. Cas. 698, at p. 704: Lord *Watson*).

Bill of Lading—Offering to Take.

"The plaintiff further contended, that, as no bill of lading was offered, the defendants could not take advantage of their conditions. But in this we also think that he fails. If he had offered to take a bill of lading, and had not been able to obtain it,—as was the case in *The Great Western Rail. Co. app. Goodman resp.* (1852), 12 C. B. 313,—there would have been ground for the argument: but there was no evidence that he had done so" (*Wilton* v. *The Atlantic Royal Mail Steam Company* (1861), 10 C. B. (N.S.) 453, at p. 469: *Erle*, C.J., delivering the judgment of the court (*Erle*, C.J., *Williams*, J., and *Keating*, J.)).

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(152) See *Loomer* v. *Starr*, *post*, p. 636.

Pledge of a Bill of Lading.

The indorsee by way of security, though not having the *property* passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; he actually does so as between himself and the shipowners if and when he claims and takes delivery of the goods by virtue of that title.

1. "The statute [The Bills of Lading Act, 1855 (18 & 19 Vict. c. 111)] contemplates the passing of 'the property in the goods' by the indorsement of the bill of lading, as a thing which may, or may not, happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes, as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be 'transferred to' the indorsee, and should *not* any longer 'continue in the original shipper or owner.' One test of the application of the statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods, as to make it just and reasonable that he should also retain rights of suit (the word is *suit*, not *action*) against the shipowner, under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights, and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.

"It is very difficult to conceive that when the goods are still *in transitu*, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. If that proposition needed illustration from authority it would be found in the cases of *Re Westzinthus* (1833), 5 B. & Ad. 817, *Spalding* v. *Ruding* (1843), 6 Beav. 376, and *Kemp* v. *Falk* (1882), 7 App. Cas. 573. Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading, as long as it remains in the hands of the secured creditor? The creditor, in the ordinary course of things, will do

nothing until the time for payment or delivery of the goods arrives. Can it then be material whether the proprietary right, thus remaining in the shipper while the goods are *in transitu*, is legal or equitable? The statute relates to a subject of general mercantile law, in which not Englishmen only but foreigners also may be, and often are, concerned. Foreign as well as British indorsements of bills of lading by way of security for advances (which may be made abroad, perhaps in countries not governed by English laws) are liable to be affected by it, whenever recourse must be had to British courts. It seems to me to be inconceivable that the construction of the words 'the property in the goods' in such a statute can have been intended to depend upon any technical distinction as that made in English law (but by no means in the laws of all other countries in which the customs of merchants prevail) between legal and equitable titles.

"It is to be observed further that the statute contemplates *beneficium cum onere* and not *onus sine beneficio*. It may be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, *quoad* the shipowner. But it would be the reverse of reasonable to impose upon him such a burden, when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment.

"On the other hand it seems impossible to suppose the legislature to have passed this statute without some reference to the custom proved in *Lickbarrow* v. *Mason* (1794), 5 T. R. 683, and to the law (whatever may be the true view of it) established on the same subject by later authorities in the English courts. And if (as I think) it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out and out sale, or that an indorsee of a bill of lading by way of security, who converts his symbolical into real possession by obtaining delivery of the goods, ought never to derive any benefit from it. The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense; viz., that the indorsee by way of security, though not having 'the property' passed to him absolutely and for all purposes by the mere indorsement

and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title.

"The authorities decided upon the statute are *Fox* v. *Nott* (1861), 6 H. & N. 630, at p. 637; *Smurthwaite* v. *Wilkins* (1862), 11 C. B. (N.S.) 842, at p. 847; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; and *The Freedom* (1871), L. R. 3 P. C. 594. Another case, *Short* v. *Simpson* (1866), L. R. 1 C. P. 248, was also cited during the argument at your Lordships' Bar" (*Sewell* v. *Burdick* (1884), 10 App. Cas. 74, at pp. 84, 85, 86, 87: Earl *Selborne*, L.C.).

2. "I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against anyone who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

"Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be tranferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think since the decision in *Thompson* v. *Dominy*, 14 M. & W. 403, in 1845, it has been undisputed law that under no circumstances could anyone not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

"But ten years later the 18 & 19 Vict. c. 111 [The Bills of Lading Act, 1855] was passed. The preamble states this as one of the objects which the legislature had in view, 'whereas by the custom of merchants a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee' (which I think for a long time before the 18 & 19 Vict. A. D. 1855 was undisputed) 'but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner.' (This, it is to my mind clear, refers to *Thompson* v. *Dominy* (1845), 14 M. & W. 403) 'and it is expedient that such rights should pass with the property.'

"The mode in which the legislature carry out the object thus

expressed in the preamble is by s. 1: 'Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, *to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement* shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.' . . .

"The first and most important question to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does 'the property' in the goods there mean any legal property in the goods; so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien; or the whole property at law having passed by way of mortgage the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a court of equity?

"I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying no doubt a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against anyone who wrongfully interfered with his right), though '*a*' property, and 'a' property against the indorser, passed 'upon and by reason of the indorsement,' yet *the* property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name" (*ibid.*, at pp. 91, 92, 93: Lord *Blackburn*).

3. "As to the reason and principle which should govern, I ask why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves? They could be pledged if on shore, but being at sea no actual delivery, which is necessary to a common law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

"Then considering the inconvenience of holding that the pledgor has only an equitable right: that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods; that the pledgee may sell and pass the entire property to

one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by indorsement the property '*may*' pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom" (*ibid.*, at p. 104: Lord *Bramwell*).

As to when a pledge of a bill of lading is deemed to be a pledge of the goods, see *ante*, pp. 137, 188.

(k) Exemption of Carriers from Absolute Liability by means of Exceptions in Charter-parties and Bills of Lading.

As we have seen, *ante*, p. 372, Section V.—Duty and Responsibility of Common Carriers, (153) in the absence of any exemption by statute, express contract, or special notice brought home to the customer, or on the ground of fraud, a carrier by land or water is, by the custom of the realm, *i.e.*, by the common law, an insurer of the goods and chattels he carries for every accident (including accidental fire and irresistible force) except by the act of God, the Queen's enemies, or inherent vice. In charter-parties and bills of lading certain exceptions to the carrier's liability are usually inserted, some being general and others special.

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(153) "The defendants' obligation or contract as a common carrier, unless limited by some special agreement with the plaintiffs or by some notice, condition, or declaration which they might lawfully make or give, was to carry and safely deliver the goods at all risks save only the act of God or the Queen's enemies" (*Walters* v. *Canadian Pacific Rail. Co.*, 1 N. W. T. R. 17: *Witmore*, J. See also *White* v. *Canadian Pacific Rail. Co.*, 6 N. L. R. 169). "The goods, then, were damaged by rain before their discharge, and the next and most material question arises on the effect of the exemption from liability, in the bill of lading, from loss by rain. It is to be observed that this is not one of the perils for which exemption is claimed, though arising from the negligence, default, or error in judgment of the employees of the ship."

"Here the goods that were landed in perfect order from the ship, while in the custody of the master, and before their delivery to the consignee, were greatly deteriorated. They were landed of necessity, it may be, and for an

Original Exception.

"The exception originally stood thus, 'the dangers of the seas excepted.' The case of *Smith* v. *Shepherd* (1795) (Abbott on Shipping, 4th ed., p. 263, notes) is supposed to have caused the introduction of the exception, which has prevailed since that time, namely, 'the act of God, the King's enemies, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted'" (*Johnston* v. *Benson* (1819), 1 B. & B. 454, at pp. 458, 459: *Dallas*, C.J.).

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excusable or legal purpose, but to the injury of the plaintiff, and for which he ought not to suffer. What the extent or nature of the injury by rain, from which the bill of lading exempts the shipowners, I shall not attempt to define; but, in my opinion, it does not cover an injury to goods requiring to be delicately handled, and exposed to wet, whether in the act of landing or from the dripping of a shed, over which the plaintiff had no control" (*Robertson* v. *Dominion Steamship Co.*, 1 Russell & Geldert, at pp. 155, 156: *Sir William Young*, C.J.).

Defendants instructed their agents at New York to charter a ship to carry certain goods thence to Sydney, C. B. The agents chartered plaintiffs' ship, and the voyage was carried out, and the goods duly delivered and received by defendants. On the way to Sydney the vessel called at Halifax, where one of the defendants, who had previously received the charter-party, visited her. He was also present at Sydney when the goods were delivered. On neither occasion did he make any objection to the freight payable under the charter-party, but subsequently refused to pay it on the ground that the rate was too high, and that his agents had exceeded their authority in entering into the charter-party at that rate:—*Held*, that, not having made any objection either at Halifax or Sydney, although fully acquainted with the rate of freight agreed to be paid, and having received the full benefit of the contract, he had thereby ratified it and must fulfil his obligations thereunder (*Loomer* v. *Starr*, 3 Geldert & Oxley N. S. Reports, 439).

The bill of lading contained the following provision: "All deficiency in cargo to be paid for by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee":—*Held*, that this provision did not give the 500 bushels shipped in excess to the carrier, and that no custom or usage was proved, giving it such meaning (*Murton* v. *Kingston and Montreal Forwarding Co.*, 32 U. C. C. P. 366). See *ante*, p. 598.

"The stowage of goods forms part of the obligation which the carrier takes upon himself when no agreement to the contrary appears. It is a duty to be discharged by the master and the crew, and one which arises upon the mere receipt of the goods for the purposes of carriage. And it is a duty which it would require an express contract to supersede or excuse. Then conditions of this nature limiting the carrier's liability, or relieving him from any, are to be construed strictly, and must not be extended to any cases but those expressly specified. Here the condition that glass is to be carried without liability for breakage, must be read as assuming that the glass had been properly stowed. It cannot be read as covering a defective stowage; 'carried' means 'during carriage,' 'during navigation,' 'in the course of the voyage,' and does not cover the stowage done, of course, before the carriage begins The damage here, it is true was caused during the voyage whilst the goods

The exceptions in a bill of lading exempt a carrier from the *absolute liability* of a common carrier and not from the consequences of the want of reasonable skill, diligence, and care on his part or that of his servants.

The exceptions limit the carrier's absolute liability, but not his duty.

That this is a settled doctrine appears from the subjoined quotations :—

1. "It appears from the observations of Lord *Wensleydale*, in *Walker* v. *Jackson* (1842), 10 M. & W. 161, at p. 169, that, in the absence of fraud, the carrier is bound as an insurer to carry and deliver the goods as they are when he receives them,—as is pointed out by some members of the court in *Wyld* v. *Pickford* (1841), 8 M. & W. 443. The defendant gets rid of that liability in the present case by the introduction of the words 'not accountable for leakage or breakage,' but not of the obligation which the law imposes upon him of taking reasonable care of the goods entrusted to him. It is no more than putting the leakage and breakage on the same footing as the act of God or the Queen's enemies. Suppose a vessel were taken by the enemy in consequence of the master's neglect of precautions which he might easily have taken,—could the owners claim an exemption on the ground of the capture? Clearly not; for, the exception necessarily implies that the capture shall not be occasioned by the act or default of the owners or the master. Lord *Tenterden*, in his Treatise on Shipping, p. 386, treating of the exception as to robbery by pirates, and citing Emerigon, Tom. I., p. 532, refers to *Mors* v. *Slue* (16..3), 1 Vent. 190, 'in which the owners were held responsible for goods taken by robbery from the ship in the river Thames within the body of a county, Chief Justice *Hale* took notice of this doctrine and said, "by the civil Admiral law, the owners are not responsible for a robbery by pirates at sea." This, however, is to be understood only in case the ship does not fall into the hands of pirates by any neglect or fault of the master.' That is equally applicable to the additional exception here of leakage and breakage. The true meaning of this contract is,—'I will take all reasonable care of the

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were being carried, but the captain's negligence which caused this damage was prior to the voyage." "An accident during navigation, the result of defective stowage, is not an accident of navigation" (*The Glengoil Steamship Co.* v. *Pilkington*, 28 S. C. R. 146 : *Taschereau*, J., at pp. 158—160. See *post*, p. 662).

"It is now thoroughly settled that the exemption in a bill of lading only exempts the shipper from the absolute liability of a common carrier, and not from the consequences of want of reasonable skill, diligence, and care, which want is popularly described as gross 'negligence'" (*Gurney* v. *McKay*, 37 U. C. Q. B. 342 : *Harrison*, C.J.).

goods, but will not be accountable for a loss arising from leakage or breakage such as usually happens without the exercise of extraordinary care.' The owner engages only to abstain from negligence" (*Phillips* v. *Clark* (1857), 2 C. B. (N.S.) 156, at pp. 163, 164 : *Willes*, J.).

2. "The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence and care, which want is popularly described as 'gross negligence.' [*Qu.*, see *ante*, p. 20.] This is settled, so far as the repairs of the ship are concerned, by the judgment of Lord *Wensleydale* in *Worms* v. *Storey* (1855), 11 Ex. 427, at p. 430 ; as to her navigation, by a series of authorities collected in *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, and (1868) L. R. 3 C. P. 476 ; and as to her management, so far as affects the case of the cargo itself, in *Laurie* v. *Douglas* (1846), 15 M. & W. 746 ; where the court (in a judgment unfortunately not reported at large) upheld a ruling of *Pollock*, C.B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., 'ordinary and reasonable care.' These authorities and the reasoning upon which they are founded are conclusive to shew that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof, which is the subject-matter of the present complaint (*Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225, at pp. 235, 236 : *Willes*, J., delivering the judgment of the court (*Kelly*, C.B., *Martin*, *Channell*, and *Cleasby*, BB., *Willes*, *Byles*, and *Keating*, JJ.)).

3. "This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land, viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss" (*Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B. 619, at pp. 623, 624 : *Bowen*, L.J.).

General Rule as to the Construction of Stipulations in Contracts. (154)

"The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made" (*Burton* v. *English* (1883), 12 Q. B. D. 218, at p. 220: *Brett*, M.R.).

"Those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words" (*ibid.*, at p. 222: *Bowen*, L.J.).

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(154) A bill of lading acknowledged the receipt on board a steamer of the defendants', in good order and condition, of goods shipped by T. (fresh meat), and contracted to deliver the same in like good order and condition . . . . loss or damage resulting from sweating, ... decay, stowage, ... or from any of the following perils, whether arising from the negligence, default, or error in judgment, of the pilot, master, mariners, or other persons in the service of the ship, or for whose acts the shipowner is liable (or otherwise howsoever), always excepted, namely (setting them out):—*Held*, affirming the judgment of the Supreme Court of Prince Edward Island, that the clause, "whether arising from the negligence, default, or error in judgment, of the master," etc., covered as well the preceding exceptions as those which followed, and was not limited in its application by the words "from any of the following perils," and the defendants were, therefore, not liable from damage to the goods shipped resulting from improper stowage, which was one of the excepted perils (*Trainor* v. *Black Diamond Steamship Co.*, 16 S. C. R. 156).

"It appears to me that the construction of this exception is plain, and entitles the shipowners to the exemption which they claim. The obvious and grammatical reading of it is, that 'loss or damage resulting from stowage,' is an excepted peril, whether arising from the negligence, default, or error in judgment, of the pilot, master, mariners, engineers, or other persons in the service of the ship for whose acts the shipowner is liable, or otherwise howsoever. That this, and not that which would confine the exception of negligence to the perils immediately afterwards enumerated, is the proper construction is apparent when we consider that what is excepted is 'loss or damage,' which might result as well from perils antecedently specified as from those subsequently mentioned."

"As regards contracts for carriage of goods by sea, the legislature has not interposed to control the contracts of the parties, stipulating for freedom from liability for negligence, as it has in England in the case of railway and canal companies, and here also to some extent in the case of railway carriers. In cases like the present the parties are free to enter into any contract they may think fit. It is, no doubt, a well established and sound rule of construction that the exception of liability for the negligence of the crew and other persons, for whose acts the owner is, by the general law, responsible, should be provided for in the most plain and unequivocal terms, and that all doubtful or ambiguous clauses should be strictly interpreted against the owner for whose benefit they are introduced into the contract. But giving the appellant the full benefit of this rule, I am unable to see that there can be the least doubt as to the

General Rule as to the Construction of Exemptions in Bills of Lading.

If ambiguity or doubt exists, the construction of a clause of exemption is to be in favour of the shipper rather than in favour of the shipowner.

1. "The word ['thieves'] is ambiguous, and being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed" (*Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546, at p. 549: *Lush*, J.). Cited and applied by *Denman*, J., in *Hayn* v. *Culliford* (1878), 3 C. P. D. 410, at p. 418.

2. "It has been held that in construing a clause in a bill of lading exempting a shipowner from liability, which clause is ambiguous and of doubtful meaning, the construction most in favour of the shipper, and not such as is most in favour of the shipowner for whose benefit the exemptions are framed, is to be applied: See per *Lush*, J., in *Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546, at p. 549; and per *Bowen*, L.J., in *Burton* v. *English* (1883), 12 Q. B. D. 218, at p. 224. I do not understand this to mean that the true canon of construction is not to be applied, but that, when applied, if ambiguity or doubt still exists, the construction is to be in favour of the shipper rather than of the shipowner" (*Norman* v. *Binnington* (1890), 25 Q. B. D. 475, at p. 477: A. L. *Smith*, J. [reading the judgment of the court (*Cave*, A. L. *Smith* and *Vaughan Williams*, JJ.)]). (155)

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meaning of the exception found in this bill of lading" (*ibid.*: *Strong*, J., pp. 171, 172; and see *post*, p. 676).

(155) By a bill of lading made in *England* by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal" . . . "unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to the consignees or to their assigns." The instrument contained, in addition to a long list of excepted risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." It was held that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages, conducted with reasonable care and skill at the place of removal have been discovered. The bill of lading in this case was a contract to be governed and interpreted by English law (*Moore* v. *Harris*, 1 A. C. 318; and see *Perkins* v. *Mississippi and Dominion Steampship Co., Limited*, 10 O. P. R. 198).

3. "Unquestionably, if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favour of the shipper" (*Baerselman* v. *Bailey*, [1895] 2 Q. B. 301, at p. 305: *Rigby*, L.J.).

4. "There is ample authority that exceptions in a bill of lading must be clear and unambiguous if the shipowner is to be relieved from the liability which he has otherwise undertaken therein" (*Owners of Cargo on Board ss. Waikato* v. *New Zealand Shipping Co.*, [1899] 1 Q. B. 56, at p. 58: A. L. *Smith*, L.J.).

5. "In the case of such careless and ambiguous phraseology I do not think we ought to assume that the construction most advantageous to the shipowners represents the true meaning. If they do not make their meaning reasonably clear to the shipper, they ought not to be held to be protected by the exception" (*ibid.*: *Rigby*, L.J.).

The Burden of showing that the Shipowners are within an Exception rests with them, and the Burden of Showing that the Shipowner is not Entitled to the Benefit of the Exception, on the ground of Negligence, is upon those so contending.

1. "As a matter of construction, it is obvious that where the contract provides that the carrier shall carry goods from A. to B., A. being the port at which the ship loaded, if the shipowners deviate they must show that they have deviated within the terms of the clause, and as the power to deviate is an exception in their favour, it seems to me that the burden of shewing they are within that exception rests with the shipowners. That is the ordinary principle of construction of exceptions upon a shipowner's contract; in other words, the construction of an exception is most strongly against the person in whose favour it is inserted" (*The Dunbeth*, [1897] P. 133, at p. 136: *Gorell Barnes*, J.). (156)

(156) Defendants undertook, by bill of lading in the usual form, to carry a number of sacks of shorts from Boston to Sydney, C. B. The master did not go to Sydney direct, but, finding the shorts overheated when he reached an intermediate port, reshipped them by steamer to Sydney. There was evidence that the shorts had been injured by water before arrival at the first intermediate port. A judgment of *James*, J., in favour of plaintiff was upheld on appeal (*Harrington* v. *Boudrot*, 21 N. S. L. R. 97).

"The onus of proof is on the defendant to bring himself within the exception of the bill of lading, and that he has not, in my opinion, done, and he is liable on his contract to deliver in good order and condition" (*McDonald*, C.J.: *ibid.* 98).

Where an exception against loss by dangers of navigation is contained in a bill of lading, and the vessel is in fact lost in a storm, the evidence of negligence

2. "That which is said in Mr. Carver's book [a treatise on the Law relating to the Carriage of Goods by Sea, by T. G. Carver, 2nd ed., p. 89, s. 78] is correct, viz., that if the loss apparently falls within the exception, the burden of shewing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, is upon the person so contending" (*The Glendarroch*, [1894] P. 226, at p. 232: Lord *Esher*, M.R.).

3. "Where a peril of the sea is set up it is sufficient for the defendant to prove the peril relied on, and he need not go on to shew that that was really not caused by him; but if the plaintiff says that it was, then he must set it up in his replication and must prove it" (*ibid.*, at p. 235: *Lopes*, L.J.).

Exceptions themselves Considered.

The various exceptions which usually occur in a clause of exemptions, will now be considered in the order in which they generally appear in a bill of lading. See Form of a Bill of Lading, *ante*, p. 612. (157)

"*Act of God.*" (158)

See also Chapter I.—Introductory; Section IV.—Inevitable Accident (a), *ante*, p. 27, where it is laid down that the act of God is any overcoming accident produced not by the agency of

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or improper conduct must be very clear in order to make the shipowner liable; and although it lies upon the defendant, in the first place, to bring himself within the exception, yet this is sufficiently done by showing a shipwreck from stress of weather; and the plaintiff is then called upon to establish that the loss would not have happened but from negligence or want of skill (*Harnden* v. *Procter*, 9 U. C. Q. B. 592).

(157) In dealing with the cause of loss, it is for the jury to say whether the loss was occasioned by perils of the sea, notwithstanding the lack of evidence as to the exact cause of the sinking (*Morrison* v. *Nova Scotia Marine Insurance Co.*, 28 N. S. R. 346).

(158) When the plaintiff agreed that his vessel should, with all convenient speed, sail from Kingston to Dresden or Chatham to take in a cargo of wheat for Kingston, and owing to stress of weather she took twenty-seven days to reach Detroit, but the delay arose from no default of the captain or crew, the defendant refused to load her, as it was improbable, owing to the lateness of the season, that the vessel could get back to Kingston. The plaintiff sued, and it was held that he could not recover and that the defendant was justified in refusing to load her (*Brown* v. *Lamont*, 30 U. C. Q. B. 392).

"This contract would not bind defendant to ship his wheat unless the *Southampton* arrived in a reasonable time, and the plaintiff must be deemed to have engaged himself to that extent. At whose risk was the delay? Is the

man, but by some practically irresistible natural cause, *e.g.*, a cataclysm, earthquake, storm, natural sudden death.

Some illustrative cases are subjoined :—

Sudden Gust of Wind.

1. The plaintiff put goods on board a hoy of the defendant, who was a common carrier. Coming through a bridge, by a sudden gust of wind, the hoy was sunk, and the goods were spoiled.

Lord *Kenyon*, C.J., held the defendant not answerable, the damage being occasioned by the act of God. For though the defendant ought not to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous ; yet this being only a sudden gust of wind, had entirely differed the case : and no carrier is obliged to have a new carriage for every journey : it is sufficient if he provides one which, without any extraordinary accident (such as this was), will probably perform the journey (*Amies* v. *Stevens* (1718), 1 Str. 127).

Running on to an Anchor in a River, no Buoy being Visible.

2. The proprietors of the Trent Navigation undertook to carry the defendant's goods from Hull to Gainsborough. In the river Humber, the vessel, on board which the defendant's goods were, sank by driving against an anchor in the river ; and the goods were in consequence of the accident, considerably damaged. The plaintiffs repaired the damage the goods had sustained, and sent them home to the defendant. The defendant refused to pay the money the plaintiffs had expended in the recovery of the goods.

"This is certainly a sea voyage. It is a general question, and no case has been cited exactly in point ; but it is clear that the carrier is liable in all cases, except for accidents happening by the act of God, or by the King's enemies. The act of God is a natural necessity, and inevitably such as winds, storms, &c. The case of robbery is very strong, but not a natural necessity ; and in this case there is an injury by a private man, within the reason of the instance of robbery ; yet I think the carriers ought to be liable.

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exception of the act of God, etc., to be held to be implied in the plaintiff's favour, so that if the vessel had been frozen up at Port Colborn, he could have come up to Chatham in the following spring and demanded a cargo ? Conceding that if the plaintiff was sued for not having his vessel there in a reasonable time, he might excuse himself upon this implied exception, is it the same thing when, after a lapse of time inexcusable on any other ground, he claims the performance from the defendant" (*Draper*, C.J. : *ibid.*, p. 172).

There is some ... of negligence here; for as the buoy could not be seen, there should have been, on that account, a greater degree of caution used" (*Proprietors of the Trent Navigation* v. *Ward* (1785), 3 Esp. 127, at p. 131: Lord *Mansfield*).

Frost Cracking Boiler Pipe.

3. Action against the defendants, as carriers by water, for not delivering a cargo in proper condition. The defence was, that the mischief was done by the act of God, which was one of the risks excepted in the bill of lading. The vessel, a steam vessel, was tight and staunch. The captain expecting to start in the morning, caused the water to be pumped into the boiler on the previous evening. The next morning it was ascertained that the pipe which conducted the water into the boiler had cracked, that a considerable quantity of water had escaped by this means into the hold, and that much of the cargo was damaged. The pipe was a sound and good one, and its bursting was occasioned by the action of frost on the external portion of it.

"No one can doubt that this loss was occasioned by negligence. It is well known that frost will rend iron; and if so, the master of a vessel cannot be justified in keeping water within his boiler in the middle of winter, when frost may be expected" (*Siordet* v. *Hall* (1828), 4 Bing. 607, at pp. 608, 609: *Best*, C.J.).

Stranding—Rule as to what Circumstances constitute it. (158A)

4. "We have excellent guides, both as to what circumstances constitute a stranding, and as to what do not. Lord *Tenterden* in *Wells* v. *Hopwood* (1832), 3 B. & Ad. 20, at p. 34, says that a rule may be fairly collected from the cases: and he goes on: 'And that rule I conceive to be this: where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum.' And *Tindal*, C.J., in delivering the judgment of the Common Pleas in *Kingsford* v. *Marshall* (1832), 8 Bing. 458, at p. 464, after saying in substance the same thing as Lord *Tenterden*, goes on: 'What more, then, is necessary? We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural

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(158A) *Western Assurance Co.* v. *Ontario Coal Co.*, 21 S. C. R. 383, *post*, p. 712.

causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause'" (*Corcoran* v. *Gurney* (1853), 1 El. & Bl. 456, at pp. 461, 462: Lord *Campbell*, C.J.).

A Snowstorm is not an Accident beyond Control.

5. "Was the snowstorm, however, 'an accident beyond the control' of the defendant? No doubt it was beyond his control, but was it an accident? I think not, because an accident is not the same as an occurrence, but it is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident; and, therefore, without going into the rule that general words are to be restricted to the same genus as the specific words which precede them, I think this natural consequence did not come within the terms of the exception in the charter-party" (*Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 316: *Willes*, J. See also *In re Richardsons and M. Samuel & Co.*, [1898] 1 Q. B. 261).

Queen's Enemies—Restraint of Princes and Rulers.

The word "enemies" includes enemies of the sovereign of the carrier, whether that sovereign be an emperor, a queen, or reigning duke.

The words "Restraint of princes and rulers" include all cases of restraint or interruption by lawful authority, *e.g.*, blockade, siege.

"*Enemies.*"

"The word 'enemies' at least *includes* enemies of the carrier, if those are not the parties to whom it is specially directed. 'King's enemies' means enemies of the sovereign of the carrier, whether that sovereign be an emperor, or queen, or a reigning duke. Lest there should be any left out, it is usual in charter-parties to add the words 'restraints of princes and rulers.' These include all cases of restraint or interruption by lawful authority; leaving the case of pirates to be ranked with other dangers of the seas, within which, according to the authority of the case of *Pickering* v. *Barkley* (1649), Styles, 132, it falls. . . . The same law is laid down in 2 Roll. Abr. 248, pl. 11, and in *Barton* v. *Wolliford* (1688), Comberbach, 56. So that these three exceptions, the act of God, the King's enemies, and restraints of princes, seem to guard the owner against all that he need be protected from by express words" (*Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163, at pp. 174, 176: *Byles*, J.).

Restraint of Princes.

Blockade is a Restraint of Princes when the ship is within the blockaded Port.

1. "Is a blockade a restraint of princes? I think it is. It is an act of a sovereign state or prince; and it is a restraint, provided the blockade is effective: and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes" (*Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404, at p. 410: *Cockburn*, C.J.).

Siege is a Restraint of Princes if the Goods are within the Besieged Place.

2. "It is said that a siege differs from a blockade, and that the principles of law applicable to the one are not applicable to the other. The American courts, it seems, have treated the case of a vessel kept within a blockaded port as being precisely within the same principle as goods detained within a besieged town, and have considered the latter as being *à fortiori* a restraint of princes. Siege and blockade are also placed upon the same footing in this respect by Grotius and by Wheaton; and I certainly see no difference between them for the purpose of a claim upon a policy or between a blockade and an embargo, so far as regards the question of restraint of princes. There are numerous cases in which a question has arisen whether a blockade was a restraint of princes; but all of them were cases where a ship or the goods had been prevented from entering the blockaded port; and the answer was that there was no such restraint, the immediate cause of their not entering being the desire of the assured not to encounter the risk of the blockade. Whenever the question may arise when the ship or the goods were within the blockaded port (*Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404), would, as it seems to me, be a distinct authority" (*Rodoconachi* v. *Elliott* (1873), L. R. 8 C. P. 649, at pp. 664, 665: *Bovill*, C.J.).

3. "A siege, where a place is completely surrounded and invested, is a stronger case than a mere maritime blockade. In the latter case the land communications are unaffected, and the commerce by sea only is interdicted. But we are unable to draw any material or substantial distinction between the two so far as they operate to

prevent or restrain all intercourse or commerce, or the entry into or exit of any goods from the besieged or blockaded places. Grotius, Book 3, I. 5, places '*oppidum obsessum vel portus clausus*' exactly on the same footing, as regards the right of neutrals to hold commerce with the belligerents; and Lord Stowell's definition of a blockade is still more applicable to a siege like the siege of Paris than to a blockade merely maritime. 'A blockade,' he says, 'is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than importation': *The Vrow Judith* (1799), 1 Rob. 152" (*Rodoconachi* v. *Elliot* (1874), L. R. 9 C. P. 518, at p. 523: *Bramwell*, B.).

A well-founded Fear of Seizure is a Restraint of Princes.

4. "It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404, and *Rodoconachi* v. *Elliott* (1874), L. R. 9 C. P. 518" (*Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q. B. 326, at p. 331: *Mathew*, J.).

Capture, Seizure, Piracy, etc.

N.B.—Perhaps it will be useful here to mention that at a general meeting of the members of Lloyd's held at Lloyd's on January 25th, 1899, the following resolution was carried unanimously:—

"That henceforth all policies or agreements for insurance are to be deemed warranted 'free from capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before, or after declaration of war,' unless the contrary be written or printed in the slip or initialled by the underwriters, and that the resolution passed by the general meeting of members on June 25th, 1898, be rescinded."

A ship while on her voyage was driven by a hard gale of wind on the coast of France, and was there captured by the enemy: she did not receive any damage from the wind.

Lord *Kenyon* said, the case was too clear to admit of argument; this was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety (*Green* v. *Elmslie* (1794), 1 Peake, 278). See also *post*, p. 656, "*Capture*."

"*Seizure.*"

"In my opinion the word 'seizure' must be taken in its ordinary and natural meaning, and is not a term of art. The passages I have cited from Phillips certainly do not prove that the word has any technical meaning, and the case of *Black* v. *Marine Insurance Co.* (1814), 11 John. (N. Y.) 287, which that author cites in support of his view as to the meaning of capture, shews, if anything, that seizure is a general term capable of a very wide meaning" (*Johnston* v. *Hogg* (1883), 10 Q. B. D. 432, at p. 434: *Cave*, J.).

Pirates are ranked with other dangers of the seas. See *ante*, p. 645, and *post*, p. 657.

For definition of "*Piracy*," see *ante*, p. 29.

Robbers—Thieves.

For definition of "*Robbery*," see *ante*, p. 29. As to larceny from or by bailees or by bailors, see *ante*, pp. 41—44.

1. "The broad principle of commercial law always was and is that the ship, in the absence of express provision to the contrary, was liable to the cargo-owner for losses occasioned by theft committed on board. This idea was of cardinal moment both in the law of insurance and in the law of carriers . . . About the middle of the century in question (the 17th) the word 'thieves' found its way into the list of the marine casualties against which insurances were effected, and from this time forth there has been a recurring discussion both in England and America as to the extent to which in policies of insurance effect ought to be given to this special stipulation. Robbery imports violence, but 'theft,' which properly speaking, does not, may be of several kinds. There may be the assailing thief from outside, the thief who 'breaks through and steals'; there may be a thief on board among those who are lawfully on board; there may, lastly, be a thief among the crew" (*Steinman and Co.* v. *Angier Line*, [1891] 1 Q. B. 619, at pp. 621, 622: *Bowen*, L.J.).

Robbers—Dangers of the Road—Theft.

2. Action brought to recover the value of a box of gold dust. The plaintiffs' agent at Panama delivered to the defendants' agent eleven boxes of gold dust for shipment to this country, and took from him a bill of lading by which (*inter alia*) robbers and dangers of the roads of whatever nature or kind were excepted. All the boxes were carried by the defendants across the Isthmus of Panama to

Chagres, and there shipped on board one of their steam vessels for Southampton, where they arrived on May 7th. On the following day the boxes were unloaded, and placed in trucks belonging to the South Western Railway Company, for the purpose of being carried to London. In the course of the transitus from Southampton to London, one of the boxes was secretly stolen from the truck. The jury found that the defendants were guilty of negligence in the conveyance of the boxes to London, and that this negligence occasioned the theft. The question was, whether the theft committed on the London and South Western Railway was an act of "robbers," or, secondly, a danger of "roads" within the true meaning of the bill of lading.

"We think it was neither. It was argued for the defendants, that the word 'robbers' ought not to be construed in the technical sense given to the word 'rob' by the English law writers, and by some of the English statutes (1 Vict. c. 87, s. 2, for instance), where it means the felonious taking from the person or in the presence of another, of money or goods, against his will, by force; as putting him in fear, for it was not likely that robbery in that sense would occur, as the packages would not usually be in the personal presence of the defendants or their servants, still less on their persons; and other statutes were cited, where its meaning is much more comprehensive, and includes a taking without force; and besides, in construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and taking these into consideration, we cannot doubt that the meaning of the contract was, that the defendants were not to be liable for the loss of the gold dust, where it was taken by force by a *vis major*, which the defendants could not resist, but that they were to be liable where it was pilfered from them. It is very unreasonable to suppose that the shippers of a very precious article, in which a large value is comprised in a very small space, which is capable of being easily abstracted by any person employed in carrying it, meant to exempt the persons to whom they gave up the custody and care of it, from all responsibility for theft committed by their crew or others, against which they could presumably guard by the exercise of reasonable care; but it is likely that they should agree to exempt them, where the goods were taken by a force which they could not resist. The nature of the transaction shows clearly, therefore, that the word 'robbers' means, not 'thieves,' but robbers by force, to whom the term is more reasonably applied, though in common parlance it is often applied to every description of theft. We have no doubt,

therefore, that in this bill of lading this is the proper meaning of the word 'robbers'; and this being so, the loss in this case was not by robbers: and that plea, in which the loss is so stated, ought to be found for the plaintiffs.

"We do not feel any difficulty as to the meaning of the term 'dangers of roads.' We think the word 'roads' either explained by the context to mean marine roads, in which vessels lie at anchor; or supposing it to mean roads on land, the dangers of roads are those which are immediately caused by roads, as the overturning of carriages in rough and precipitous places; losses by robbery are already provided for under the general term robbers; and the same reason which induces us to believe that the parties did not mean that the defendants should be exempted from pilfering by thieves, when loss by robbers is exempted, leads us to the conclusion that they did not intend that they should be protected in the case of loss by thieves in passing along roads" (*De Rothschild* v. *Royal Mail Steam Packet Company* (1852), 7 Ex. 734, at pp. 742, 743: *Parke*, B.).

"*Thieves.*" (159)

3. "The case states that the box was stolen while on board the vessel, either during the voyage or after her arrival in port; but there was no evidence to show whether it was stolen by one of the crew, or by a passenger, or, after her arrival, by some person from the shore. From this statement we must take it as a fact that there were passengers on board. The question is, is that loss within any of the exceptions in the bill of lading, which are the act of God, the Queen's enemies, pirates, robbers, thieves, barratry of the master or mariners, etc.? The first question is, does 'thieves' include persons on board the ship, or is it to be limited, as

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Canadian Cases.

(159) The defendants claim that they were exempt under several of the exceptions in the bill of lading—as, first, against loss by barratry; or, secondly, thieves; or, thirdly, losses which could be insured against. But it was held in *Taylor* v *Liverpool*, L. R. 9 Q. B. 546, in an action on a policy of assurance containing similar exceptions—*First*, that 'thieves' could only be applied to thieves external to the ship, and, assuming theft by one of the crew to be barratry; *secondly*, that it lay on the defendants, the shipowners, to bring the loss within one of the exceptions by showing by whom the theft had been committed; and the court held that the plaintiffs were therefore entitled to recover for the loss. This decision is strictly applicable to the present case. There is no evidence to show when, where, or by whom, after the goods were taken on board, these goods were stolen" (*Ronne* v. *The Montreal Ocean Steamship Co.*, 19 N. S. Reps., 321: *James*, J.).

has been held in cases as to policies of insurance, to persons outside the ship and not belonging to it. The word is ambiguous, and, being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed; for if it was intended to give to it the larger meaning which is now contended for, the intention to give the shipowner that protection ought to have been expressed in clear and unambiguous language. It is not, I think, reasonable to suppose, when the language used is ambiguous, that it was intended that the shipowner should not be liable for thefts by one of the crew or persons on board. The shipowner must protect himself if he intends this by the use of unambiguous language" (*Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546, at pp. 549, 550 : *Lush*, J.).

"*Thieves of whatever kind, whether on board or not or by land or sea.*"

4. "The introduction of the term 'thieves' into the exceptions in English bills of lading is of a later date [than the middle of the 17th century], in older bills of lading dangers of the sea being the only accidents excepted (Beawes, p. 196 ; Abbott, 5th ed., p. 214). For goods stolen or embezzled the master was liable, unless there was *vis major* (1 Molloy, p. 329). By degrees the list of exceptions was expanded, and the word 'thieves' in a bill of lading has received a judicial interpretation in the case of *Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546. It was there held in effect that the term was only intended to deal with thefts by persons 'not belonging' to the ship, an expression which, however, is ambiguous, but which in *Taylor's Case* seems to be used as equivalent to persons outside the ship. The present form of bill of lading ['thieves of whatever kind, whether on board or not, or by land or sea'] is subsequent in date to the decision in *Taylor's Case*, and is designed apparently to widen still further the meaning there attributed to the word 'thieves.' But thieves may 'belong' to a ship in two ways. They may be persons who, though they are lawfully on board, have nothing to do with the service of the ship ; or they may be the master and crew or persons in the service of the ship. Is the language 'thieves of whatever kind, whether on board or not, or by land or sea,' intended in this bill of lading to add both of these classes of depredators, or only the former class, to the 'outside thieves,' who were previously covered by the word in ordinary bills of lading? This question of construction must be decided on the broad principle which has been

so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land, viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servants has contributed to the loss. Accordingly in *Grill* v. *General Iron Screw Collier Co., Limited* (1866), L. R. 1 C. P. 600, on appeal (1868), L. R. 3 C. P. 476, an exception in a bill of lading of 'accidents of whatever nature or kind soever' was held not to cover a collision caused by the negligence of master and crew. See also *Phillips* v. *Clark* (1857), 26 L. J. C. P. 168; *Czech* v. *General Steam Navigation Co.* (1867), L. R. 3 C. P. 14. It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils: the exception, in other words, limits the liability, not the duty. Upon this ground, I am of opinion on this bill of lading that the mere introduction into the list of exceptions of the words 'thieves of whatever kind,' etc., does not relieve the shipowner from liability for the thefts committed by those in the service of the ship" (*Steinman and Co.* v. *Angier Line*, [1891] 1 Q. B. 619, at pp. 623, 624: *Bowen*, L.J.). (160)

Canadian Cases.

(160) A number of cases of wine were delivered to S. & Co., defendants' agents, at the port of Antwerp, to be forwarded to plaintiff at Halifax, N. S. The bill of lading was signed by S. & Co., pp. G. K., and described the goods as "shipped in good order and condition." The goods were shipped from Antwerp by a steamer running to Liverpool, G. B., and on their arrival at that port were reshipped on board one of the defendants' steamships for Halifax. On their arrival plaintiff was notified of the fact by C. & Co., defendants' agents at Halifax, and was required to pay the freight and take delivery. C. & Co. also demanded and received from plaintiff his share of a general average loss consequent to an accident to the ship on the voyage. On examination of the goods previous to delivery, it was found that several of the cases had been tampered with, and a number of bottles of wine emptied of their contents. G. K., by whom the signature of S. & Co. was affixed to the bill of lading at Antwerp, had no written authority to do so, but was the chief clerk and proxy of the firm, and acted in the usual course of business. It was held that the bill of lading, having been produced by the plaintiff at the request of the defendants' agents at Halifax, and having been recognised by them, and they, having demanded and received from plaintiff his proportion of the general average loss, the paper, whether properly signed or not, must be treated as the contract under which defendants received and carried the

Shipowners' Servants.

"We know what the history of these limitations has been. At first the shipowner was freed from liability for the consequences of the negligence of the master and mariners in navigating the ship. Then the exemption from liability was applied to acts of the other servants, which would include stevedores employed by the captain to stow the cargo, and then the words 'or otherwise' were added to the clause. It seems to me that there is no ground for imputing ambiguity to these words ['any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship or otherwise,'] which must therefore be construed according to their ordinary meaning. The clause exonerates the shipowner from liability for the negligence of his servants, whether in navigating the ship or not" (*Baerselman* v. *Bailey*, [1895] 2 Q. B. 301, at p. 305: *Rigby*, L.J.).

Perils and all other Dangers and Accidents of Seas, etc.
Perils of the Seas. (161)

The words "perils of the sea" mean the same thing, whether they appear in a bill of lading, a charter-party, or a policy of assurance. But the rights of a party relying on an exception of sea perils in a contract of carriage may be very different from those of an assured claiming for a loss by the like perils under a policy. Negligence of a carrier will defeat his right to claim the benefit of the exception, not because it prevents the loss being a loss by sea perils, but because his negligence gives a cross right to the underwriter to an equivalent amount.

"Perils of the sea" mean perils to which a marine adventure is subject. See *per* Lord *Herschell* in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser, and Co.* (1887), 12 App. Cas. 484, at p. 498.

Canadian Cases.

goods, that defendants were bound by the admission in the bill of lading that the goods were received in good order and condition, and the goods having been tampered with while in their possession, in the absence of evidence to bring them within the exemptions in the bill, defendants were liable (*Ronne* v. *Montreal Ocean Steamship Co.*, 19 N. S. R. 312).

(161) Insurance in a marine policy against loss "by peril of the seas" does not cover a loss by barratry (*O'Connor* v. *Merchants Marine Insurance Co.*, 16 S. C. R. 331).

"The words '*dangers of the lake*' must have the same import, when applied to our navigation, as the words 'perils of the sea' applied to the ocean, and they are held clearly to denote the natural accidents peculiar to that element" (*Larned* v. *McRae*, 1 U. C. Q. B. 104: *Robinson*, C.J.).

"All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such" (*ibid.*, at p. 492, Lord *Bramwell*, who there puts this definition forward with distrust).

The following casualties come within the words "perils of the sea":

Those happening during the voyage which reasonable skill, diligence, and care cannot guard against, and those which cannot be foreseen as the necessary or ordinary incidents of the voyage, *e.g.*, capture, press gang, pirates, or gross and culpable negligence of another ship's crew.

The following losses and casualties do not come within the words "perils of the sea":

Losses occasioned by the negligence of the master or crew of the carrying vessel, *e.g.*, barratry. (162)

Losses caused by the natural and inevitable action of the wind and waves, *e.g.*, wear and tear.

Casualties which could be foreseen as the necessary or ordinary incidents of the voyage.

The above principles have been frequently acted upon and are well illustrated by the following cases, which are given in order of date: (163)

Collision without Negligence.

1. Action against defendants, as the owners of the ship *Atlas*, to recover damages for the loss of goods which had been shipped by the plaintiff. The bills of lading were in the usual form, with an exception of the *perils of the sea*. (164)

Canadian Cases.

(162) The general terms in a policy of marine insurance "all other perils, losses or misfortunes that have or shall serve to the hurt, detriment or damage of the aforesaid vessel or any part thereof" are not sufficient to entitle the assured to recover for a loss occasioned by the barratry of the master, when barratry has not been expressly mentioned in the policy as one of the risks insured against (*O'Connor* v. *Merchants*, 20 N. S. L. R. 514).

(163) Insurance in a marine policy against loss "by perils of the seas" does not cover a loss by barratry (*O'Connor* v. *Merchants Marine Insurance Co.*, 16 S. C. R. 331). "The court found barratry committed, and in my opinion could not find otherwise. Barratry is a peril specially insured against by express words, and which was not specially insured against in this case. . . . This, in my opinion, was not a loss by perils of the sea, but by barratry. The loss, in my opinion, cannot be separated from the barratrous act which was not insured against" (*ibid.*: Sir *W. J. Ritchie*, C.J.).

(164) The defendant received the goods on an express agreement that they were not to be in anywise liable for any loss or damage which might occur in the course of the carriage or delivery. The damage happened without any negligence or want of care on the part of the defendants or their servants, through a collision on the lake:—*Held*, that as the plaintiff, by his agreement, was subject to the risks of navigation the defendants were entitled to a verdict (*Crofford* v. *Brown et al*, 11 U. C. Q. B. 96).

Two ships, called the *Patriot* and the *Matthew*, were sailing in one direction, and the *Atlas* in another; the *Matthew* was to leeward when they saw the *Atlas* coming; the *Matthew* steered to keep closer to the wind, in order to give the *Atlas* an opportunity to pass; the *Atlas* mistook the object; and, unable to weather both ships, she and the *Patriot* ran foul of each other, and the *Atlas* went down.

Lord *Kenyon* said, "if the defendants have been guilty of any degree of negligence, and it could have been proved that the accident could have been prevented, they would certainly have been liable; but they are exempt by the condition of the charter-party from misfortunes happening during the voyage, which human prudence could not guard against,—against accidents happening without fault in either party. I am of opinion, that neither ship could be deemed to be in fault: and that the misfortune must be taken to be within the exception of the perils of the sea" (*Buller and Others* v. *Fisher and Others* (1800), 3 Esp. 67.

Press Gang.

2. A vessel in order to discharge the remainder of her cargo in Sutton Pool, at Plymouth, was, with a pilot on board, warped to the entrance of Stonehouse Gut; whereupon the pilot sent two of the crew ashore in the ship's boat to make fast another line to the shore, and to cast off the former line, who were immediately impressed in His Majesty's service in sight of the ship; in consequence of the rope not being cast off, the bows of the vessel were checked and she went ashore, was very much strained, and made a great deal of water. *Heath*, *Rooke* and *Chambre*, JJ., differed from Sir *James Mansfield*, C.J., and held the loss to be one by the perils of the sea (*Hodgson* v. *Malcolm* (1806), 2 B. & P. N. R. 336).

Collision through the Gross and Culpable Negligence of another Ship's Crew.

3. A ship named the *Margaret* ran foul of the *Helena* by the grossest neglect; for when, upon the shock being given, some of the *Helena's* crew went on board the *Margaret*, they found only one man on the deck, and he was asleep.

"I do not know how to make this out not to be a peril of the sea. What drove the *Margaret* against the *Helena*? The sea! What was the cause that the crew of the *Margaret* did not prevent her from running against the other, their gross and culpable negligence? But still the sea did the mischief" (*Smith* v. *Scott* (1811), 4 Taun. 126, at p. 127: *Mansfield*, C.J.).

Capture.

4. The *Heinrich*, in 1810, on her passage from Elbe to London, fell in with His Majesty's gun-brig, the *Aggressor*. The captain of the *Heinrich*, mistaking the *Aggressor* for a Frenchman, produced simulated papers, concealing the British licence under which he sailed. The *Aggressor* took the *Heinrich* in tow, and the latter in order to keep up was obliged to use an extraordinary press of sail, and, during a gale of wind, and a high sea, shipped a quantity of water, by which the cargo was damaged.

"By the act of capture the vessel was divested of all self-command and power of protection, and exposed to those perils of the sea which in fact did attach" (*Hagedorn* v. *Whitmore* (1816), 1 Stark. 157, at p. 160 : Lord *Ellenborough*).

5. In *Fletcher* v. *Inglis* (1819), 2 B. & Ald. 315, *Abbott*, C.J., held it to be a loss by a peril of the sea where a transport engaged in the service of the Government was ordered into Boulogne ; where, under the direction of the superintendent of transports, she was moored near one of the quays and owing to the tide broke eighteen of her knees by striking the hard uneven bottom several times.

See also *ante*, p. 647.

"*Free from Mortality.*"

6. "The insurance was on living cattle, which, in the course of the voyage, have been killed by the rolling of the ship in a violent tempest. They have been killed, therefore by a peril of the sea. Under the general terms of the policy, the underwriters would be answerable. It lies upon them, therefore, to show that there is a special exception in this policy applicable to the present case, in order to relieve them from the effect of their general liability. The expression used in the policy is 'free from mortality.' Now the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes. There may, however, indeed, be a remote cause, which may sometimes superinduce a natural cause" (*Lawrence* v. *Aberdein* (1821), 5 B. & Ald. 107, at p. 110 : *Abbott*, C.J.).

[This case was followed in *Gabay* v. *Lloyd* (1825), 3 B. & C. 793.]

Barratry.

7. "The cases in the Privy Council and those in the Courts of Common Law, particularly *Lloyd* v. *General Iron Screw Collier Co.* (1864), 3 H. & C. 284, and *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600 and (1868), L. R. 3 C. P. 476, show that losses occasioned by negligence are not within the

exception of 'perils of the seas' in a bill of lading. *A fortiori*, therefore, losses by barratry are not within the exception, and the boring of holes was admittedly the barratrous act of the crew. Common sense and the interests of navigation seem to render it desirable that courts of law should not include barratry within the exception of dangers or perils of the seas, and the entire tenor of the decisions justifies me in refusing so to include it" (*The Chasca* (1875), L. R. 4 A. & E. 446, at pp. 448, 449: Sir *Robert Phillimore*).

Piracy.

8. "Leaving the case of pirates to be ranked with other dangers of the seas, within which according to the authority of *Pickering* v. *Barkley* (1649), Styles, 132, it falls" (*Russell* v. *Niemann* (1864), 17 C. B. (N.S.) 163, at p. 175: *Byles*, J.).

Collision.

9. "*Story*, J., in s. 512A of his work on Bailments, in which speaking of the well-known and long established exception contained in maritime contracts for the carriage of goods of 'perils of the sea,' he says, 'the phrase, "perils of the sea," whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still, in either sense, be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is, that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party.'

"The same principle of construction has been acted upon by the English courts and applied to the case of a loss occasioned by collision. Thus, in *Lloyd* v. *General Iron Screw Collier Co., Limited* (1864), 3 H. & C. 284, it was held that the exception in the bill of lading of 'accidents or damage of the seas, rivers and steam navigation of whatever nature or kind soever,' did not exempt the shipowner from responsibility for the loss of goods which arose from a collision caused by the negligence of the master

or crew. This decision was discussed and followed in *Grill* v. *General Iron Screw Collier Co., Limited* (1866), L. R. 1 C. P. 600. A similar construction was given to a bill of lading which contained a clause that the shipowner 'is not to be accountable for leakage or breakage'; in the earlier case of *Phillips* v. *Clark* (1857), 2 C. B. (N.S.) 156, and more recently in *Czech* v. *General Steam Navigation Co.* (1867), L. R. 3 C. P. 14" (*Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1882), 9 Q. B. D. 118, at pp. 123, 124: *Pollock*, B.).

Peril of Navigation.

Negligent Navigation of other Ships.

10. "A peril of the sea is a peril caused by some action of the elements, but what is a peril of navigation? Navigation is the act of navigating ships. I will not say that a danger or accident caused by the mode in which the carrying ship is navigated would be a danger or accident of navigation. But, putting aside the case where the loss was so occasioned, one class of dangers which would most readily occur to the minds of persons accustomed to the sea would be the dangers caused by the negligent navigation of other ships. There are other dangers, but this is perhaps the principal and most obvious kind of danger which may happen at sea other than those included in the expression 'perils of the sea'" (*Sailing Ship "Garston" Company* v. *Hickie, Borman & Co.* (1886), 18 Q. D. B. 17, at pp. 21, 22: Lord *Esher*, M.R.).

The Interpretation of the words "Perils of the Sea" is the same in Charter-parties, Bills of Lading and Policies of Assurance.

"Dangers and Accidents of the Seas."

11. "The question, What comes within the term 'perils of the sea' (and certainly the words 'dangers and accidents of the sea' cannot have a narrower interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these

words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (1816), 5 M. & S. 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words 'perils of the sea' occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded; whilst, in the former, you may go behind the *causa proxima* and look at what was the real or efficient cause. It is on this view that the Court of Appeal acted in *Woodley* v. *Michell* (1883), 11 Q. B. D. 47. Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exceptions of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two

instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by *Willes*, J., in his judgment in *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, at pp. 611, 612. The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of 'perils of the sea.' It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, *Willes*, J., said, 'I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea ; the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant.' . . . I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea ; and I think it would give rise to distinctions resting on no sound basis, if it were to be held that the exception of perils of the sea in a bill of lading was always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency. Take the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost, because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, whilst a similar loss arising from a vessel coming into contact with a rock not marked upon the chart admittedly would be? And what substantial distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of *Woodley* v. *Michell* (1883), 11 Q. B. D. 47 cannot be supported" (*Wilson, Sons & Co.* v.

Owners of Cargo, per the "Xantho" (1887), 12 App. Cas. 503, at pp. 508, 509, 510, 511, 512: Lord *Herschell*).

Leak caused by Rats.

12. "My Lords, I have so recently expressed, in the case of *Wilson* v. *Owners of Cargo per The Xantho* (1887), 12 App. Cas. 503, my views upon the interpretation to be put upon the words 'dangers and accidents of the seas,' occurring in a bill of lading, that I need trouble your Lordships with but few observations in this case.

"I take the facts to be, that the damage occurred by the sea entering through a leak caused by rats, without any neglect or default on the part of the shipowner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. . . . I quite concur with the view expressed in *Laveroni* v. *Drury* (1852), 22 L. J. Ex. 2, that injury done to a vessel or its cargo by rats is not damage by perils of the sea. But in that very case *Pollock*, C.B., said: 'If indeed the rats had made a hole in the ship through which water came in and damaged the cargo, that might very likely be a case of sea damage.' The Master of the Rolls says that the distinction is a very fine one between damage done by rats which, it may be, so eat into the timbers of a ship as to render it unfit to proceed to sea, and the loss of the vessel owing to the incursion of the water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that *Pollock*, C.B., shared this view.

"It has been held in the United States, in the case of *Garrigues* v. *Coxe* (1809), 1 Binney, Penn., 592, that a leak occasioned by the eating of rats, without negligence on the part of the shipowner, was a risk covered in a marine policy by the words 'perils of the seas'" (*Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518, at pp. 529, 530: Lord *Herschell*).

13. "It is now conclusively settled by the series of cases reported in the 12th App. Cas., of which *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518, is the last, that 'perils of the sea' mean the same thing whether they appear in a bill of lading, a charter-party, or a policy of assurance. But the rights of a party relying on an exception of sea perils in a contract of carriage may be very different from those of an assured claiming for a loss by the like perils under a policy. Negligence by the carrier will defeat his right to claim the benefit of the exception, not because it prevents

the loss being a loss by sea perils, but because his negligence gives a cross right to the underwriter to an equivalent amount: See Lord *Herschell's* opinion in *The Xantho* (1887), 12 App. Cas. 503, at p. 510, citing *Willes*, J., in *Grill* v. *General Iron Screw Collier Co.* (1866), L. R. 1 C. P. 600, at p. 611" (*Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114, at pp. 125, 126: *Collins*, L.J.). (165)

Canadian Cases.

(165) "And as to the alleged negligence of stowage, the defendants alleged in reply that they had exhibited ordinary care to prevent the cargo catching fire, and taken special precautions for extinguishing any fire which might break out. But the defendants by 'ordinary care' merely meant that they had stowed the hay in the accustomed manner, which may much more accurately be described as the ordinary want of care: viz., by piling it up very nearly to the carlings, directly in rear of the boilers, in bales, but unprotected by any covering, with the loose spikes of hay sticking out and within a few feet of the 'connections,' the after part of which was at times red hot; and one witness swept loose hay away from the boilers two or three times. To carry hay in such a manner as that is to invite a conflagration and to render it irremediable if once started, and, even if this were the universal practice, it must be allowed to be most careless and imprudent. Now ordinary care does not mean the care (or recklessness) usually exhibited but the care, *i.e.*, the precaution which would be exhibited by a man of ordinary prudence and experience; and a reckless carrier cannot be excused by showing that he has for years been always reckless" (*Hamilton* v. *Hudson's Bay Co.*, British Columbia Reps. 184: Sir *Matthew Begbie*, C.J.). See *ante*, p. 637.

"The defendants' obligation or contract as a common carrier, unless limited by some special agreement with the plaintiffs, or by some notice, condition or declaration which they might lawfully make or give, was to carry and safely deliver the goods at all risks, save only the act of God or the Queen's enemies. In that case they were the insurers of the goods, and if they failed to deliver they would have committed a breach of their contract and would be liable therefor, and that whether such failure was brought about by their own negligence or wrongful act in managing their railway or otherwise, or by the negligence or wrongful act of another person, or by accident" (*Walters* v. *Canadian Pacific Rail. Co.*, 1 N. W. T. R. 17: *Witmore*, J.; *White* v. *Canadian Pacific Rail. Co.*, 6 M. L. R. 169).

SECTION XVII.

DAMAGES.

(a) *Arising naturally or from notice*, p. 663.
(b) *Causa causans and causa proxima*, p. 672.
(c) *Insurance money*, p. 678.

(a) Damages arising Naturally or from Notice. (166)

(i.) The damages for a breach of contract of carriage must be such as may fairly and reasonably be considered, either as arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

(ii.) Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known

Canadian Cases.

(166) Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show, and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company (*Kennedy* v. *American Express Co.*, 22 O. A. R. 278).

Where the owner of a vessel agrees to send the vessel with a cargo after the period when it is customary at the port to lay them up for the winter, it is no excuse that the master, deeming it imprudent to sail, refuses to go (*Borden* v. *Churchill*, N. S. Reps., Thompson, 187).

"Unless there is something in the charter-party, stipulating as to the time at which the vessel shall arrive at the port of loading, or showing a contrary intention to that hereinafter stated as being implied, and notwithstanding the usual stipulation that the vessel shall proceed with all dispatch, or with all convenient speed (saving the perils of the seas, etc.), there is an implied term of the contract, operating as a condition precedent, that the vessel shall arrive at the port of loading in time for the contemplated adventure; and if the venture contemplated by the charter-party is of such a character as that it would, in a commercial sense, be wholly frustrated as a commercial speculation by certain delay, then upon the happening of such delay, the charter-party may be treated as at an end by either party who is not in fault in occasioning the delay; for, that which was contemplated by both parties, and for which they bargained, has become, by the delay, incapable of being performed at all" (*Jordan* v. *Great Western Insurance Co.*, 24 N. B. R., *King*, J., at pp. 433, 434).

"To enable a charterer to put an end to the contract, the delay must be such as frustrates the object of the voyage; in other words, the voyage both parties contemplated must have become impossible" (*Carvill* v. *Schofield*, 9 S. C. R. 370: *Ritchie*, C.J.).

to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The notice in such cases has no effect, except so far as it leads to the inference that a term has been imported into the contract making the carrier liable for the extraordinary damages. The knowledge must be brought home to the carrier under such circumstances that the customer must know that the carrier reasonably believes that he accepts the contract with the special condition attached to it.

(iii.) In the absence of an express contract to the contrary, the mere receipt of the goods after such a notice as before mentioned, does not render the carrier liable to more than ordinary damages.

The above simple and plain guiding principles are clearly laid down in the authorities following:

Principle to be Deduced from all the Authorities.

1. "The case comes within the principle clearly to be deduced from all the authorities (not excepting the case of *Hadley* v. *Baxendale* (1854), 9 Ex. 341 [at p. 354], itself, whatever view may be taken of the dictum in that case with respect to the effect of notice) viz., that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it" (*Horne* v. *Midland Rail. Co.* (1873), L. R. 8. C. P. 131, at pp. 137, 138: *Kelly*, C.B.; cited by Sir *Robert Phillimore* in *The Parana* (1876), 1 P. D. 452, at p. 463; by *Bowen*, L.J., in *Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, at p. 93; and by the Earl of *Halsbury* in *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, at p. 419).

Effect of Intimation of the Consequences of Non-delivery by Carrier discussed.

2. "A question of very great importance has been raised in the course of the argument, to which it is proper to refer, though, for reasons I shall presently state, I do not think it will ultimately become necessary to decide it—that is to say, the question what the position of a railway company is when goods are entrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods [military shoes] with which we have to deal are

not the subject of any express statutory enactment ; the case with respect to them depends on the common law taken in connection with the Acts relating to the defendant's railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now suppose that an intimation is made to the railway company, such as Mr. Field contended, this amounted to, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it ; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned" (*ibid.*, at pp. 136, 137 : *Kelly*, C.B.).

3. "How can it be, in the absence of an express contract to that effect, that by reason of a mere communication to the defendants that the goods would be thrown on the plaintiff's hands if not delivered in time, so widely different a liability can arise upon contracts for which the amount of the consideration was the same, and in all other respects precisely similar? There is also another consideration which arises with respect to the case of a carrier, such as this is, showing the great importance of, as far as possible, keeping to a uniform rule with regard to damages in such cases. If such a notice as this were to be held sufficient to impose this exceptional liability on carriers, they would be laid open to imposition without end. There would be constant attempts to set up against them special circumstances, of which they would be alleged

to have had notice, to enhance the damages. It seems to me that it would be very dangerous to impose any liability on a carrier to damages beyond the ordinary and natural consequences of his breach of duty, in the absence of something equivalent to a contract on his part to be liable to such damages" (*ibid.*, at pp. 139, 140 : *Martin*, B.).

4. "Then if there was no special contract, what was the effect of the notice? In the case of *Hadley* v. *Baxendale* (1854), 9 Ex. 341, it was intimated that, apart from all question of a special contract with regard to amount of damages, if there were a special notice of circumstances the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been any case in which it has been affirmatively held that in consequence of such a notice the plaintiff could recover exceptional damages. The counsel for the plaintiffs could not refer to any such case, and I know of none. If it were necessary to decide the point, I should be much disposed to agree with what my brother Martin has suggested, viz., that in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss. Before, however, deciding the point, I should have wished to take time to consider" (*ibid.*, at p. 141 : *Blackburn*, J.).

5. "It seems to have been accepted as the law from the case of *Hadley* v. *Baxendale* (1854), 9 Ex. 341 downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree, however, with the suggestion that the notice in such cases can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages. As *Willes*, J., says, in *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499, at p. 509, [and adhered to in *Horne* v. *Midland Rail. Co.* (1872), L. R. 7 C. P. 583, at p. 591] 'the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it'" (*ibid.* pp. 145, 146 : *Lush*, J.).

The settled Principle.

6. "The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either

the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object" (*Simpson* v. *London and North Western Rail. Co.* (1876), 1 Q. B. D. 274, at p. 277 : *Cockburn*, C.J. [cited by Sir *Robert Phillimore* in the case of *The Parana* (1876), 1 P. D. 452, at p. 463 ; by *Mellish*, L.J., in the same case (1877), 2 P. D. 118, at p. 120 ; and by *Brett*, M.R., in *The Notting Hill* (1884), 9 P. D. 105, at p. 113. See also *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, at p. 225, and *Duckham* v. *Great Western Rail. Co.* (1899), 80 L. T. 774, at p. 776]).

The Inquiry in such Cases is, whether the Damages are the Natural and Reasonable Result of the Carrier's act. (167)

7. "The rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort, and it has been laid down many times both in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, and other cases. In Mayne on Damages (3rd ed.), at p. 39, it is thus stated: 'The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's acts ; it will assume this character if it can be shown to be such a

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Canadian Cases.

(167) See *Wallace* v. *Swift*, 31 U. C. Q. B. 526, *ante*, p. 236.

On October 3rd the plaintiff chartered *The Erie Bell*, a vessel owned by the defendants to carry salt from Goderich to Milwaukee at 75 cents a ton. On Octobor 11th the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at one dollar per ton, but did not, preferring to wait for the defendants' vessel, which was loaded on November 25th. Owing, however, to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich Harbour, and it was then impossible to forward the salt otherwise than by rail ; and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail and paid his consignee the difference in price for salt which he had to buy in Milwaukee, and that agreed to be paid to the plaintiff. It was held by the Court of Appeal, affirming the decision of the court below, that the plaintiff was not bound, at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at one dollar per ton on the receipt of the telegram of October 11th, and that under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee, as also the excess of freight (*McEwen* v. *McLeod*, 9 O. A. R. 239).

consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties.' The latter is only a repetition of the phrase in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, which has since been frequently criticised. There the phrase was applied to a case where goods were delivered to a carrier with notice of a contract which made the delivery of the goods within a certain time an essential part of the contract" (*The Notting Hill* (1884), 9 P. D. 105, at p. 113 : *Brett*, M.R.).

8. "The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill* (1884), 9 P. D. 105, a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendant's act ; such a consequence as in the ordinary course of things would flow from the act. The law would be the same in Victoria unless it has been otherwise enacted by the legislature, which it is not said it has been" (*Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222, at p. 225 : Sir *Richard Couch*, delivering the judgment of the Judicial Committee).

Qualification of the Principle.—The Damages Recoverable must be such as are the Natural and Probable Result of the Breach of Contract.

9. "The general principles governing the assessment of damages for breaches of contract are, however, clearly, with slight qualification, enunciated in *Hadley* v. *Baxendale* (1854), 9 Ex. 341. In delivering the considered judgment of the court in that case, *Alderson*, B., said : 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract shall be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

"The qualification I have referred to will be found in the observations of *Cotton*, L.J., in delivering his judgment in *McMahon* v. *Field* (1881), 7 Q. B. D. 591, at p. 597. 'In my opinion,' said the Lord Justice, 'the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract.' In Story on Agency, s. 217c, it is said 'the loss or damage need not be directly or immediately caused by the act

which is done or which is omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or a just consequence. But it will not be sufficient if it be merely a remote consequence or an accidental mischief.'

"Simple and plain as the guiding principles appears to be, it has not always been found easy to apply them to the infinite variety of circumstances under which contracts have been made and broken. Numerous reported cases, most of which will be found collected in Mayne on Damages and in the notes to *Vicars* v. *Wilcocks*, 2 Sm. L. C., 9th ed., p. 577, testify to this" (*Lepla* v. *Rogers*, [1893] 1 Q. B. 31, at pp. 35, 36 : *Hawkins*, J.).

"What is the rule of law on the subject? The test is rightly laid down by *Charles*, J. (in the court below, [1895] 1 Q. B. 857, at p. 859), when he says that the question is whether the damages can 'be regarded as the natural consequence of the defendant's breach of contract; or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties'" (*Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, at p. 643 : Lord *Esher*, M.R.).

The Costs of an Action brought by a Third Party against the Customer may be the Natural and Reasonable Consequence of a Carrier's Breach of Contract.

"To such costs we have to apply the second branch of rule [laid down in *Hadley* v. *Baxendale* (1854), 9 Ex. 341] which I have mentioned : and the question is whether such costs [incurred by the plaintiffs in defending a previous action brought against them] under the special circumstances of the case come within the words there used. Is the damage occasioned to the plaintiffs by the loss of such costs a damage which may reasonably be supposed to have been within the contemplation of the parties, at the time when they made the contract, as a probable result of the breach of it? The way in which this branch of the rule should be brought to bear upon a somewhat cognate class of cases, viz., where damages recovered against one of the contracting parties by a third person are sought to be recovered from the other contracting party, has been illustrated by the judgment of this court in *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85. No new law, however, was laid down in that case, though it is one of some importance, because it contained an elaborate exposition of the manner in which the second branch of the rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, is to be applied in such cases ; and difference of subject-matter does not necessarily prevent the case being useful as an illustration

how the rule should be applied in another case" (*Hammond & Co.* v. *Bussey* (1887), 20 Q. B. D. 79, at pp. 93, 94: *Bowen*, L.J.). Followed in *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413. See also *Vogan & Co.* v. *Oulton* (1899), 81 L. T. 435, following *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640.

Damages for Non-delivery by Carrier within a Reasonable Time.

The consignee is entitled to recover from the carrier the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered. (168)

Fall in Market Price.

1. "We must assume that the hops were to be delivered in London on a certain day, and that by reason of the defendants' breach of duty they could not be delivered until another day. It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65*l.* If that be not a direct, immediate and necessary consequence of the defendants' breach of duty, it is difficult to understand what would

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Canadian Cases.

(168) "In the case I have put, of goods being sent without any fixed predetermination on the part of the sender to sell them immediately on their arrival, the carrier need not be placed in any unfair position. The maximum of compensation in such case should be the difference in market value at the date of their actual arrival and at the date when, but for the negligence of the carrier, they would have arrived, and, I should think, interest on that difference. If there be no fall in the market between those dates, or the date of actual sale, interest only should be recoverable; and so if there be a rise in the market and again a fall before actual sale, the difference between the highest price obtainable, assuming it still to be less than the market value at the date when the goods should have arrived and the market value at the latter date, would, I take it, be the proper measure of damages. I have considered this point, and I give my views upon it, because I have desired to see whether there is any practical difficulty in applying the rule where the sender of goods should send them, not necessarily for immediate sale, but intending to govern himself by the state of the market. I think that such a case presents no real difficulty" (*Monteith* v. *Merchants Dispatch Co.*, 9 O. A. R. 293: *Spragge*, C.J.O., and *ante*, p. 609. Judgment of *Hagarty*, C.J., *ibid.* See also *Young* v. *Laidlaw*, 12 U. C. C. P. 612; *Gibbs* v. *Gildersleeve*, 26 U. C Q. B. 471).

"Surely the indorsee of a bill of lading would have an action against the carrier for any cause arising between the time of the delivery of the goods and the delivery of the bill of lading" (*In re Central Bank of Canada*, 21 O. R. 515: *Meredith* J. See also *McPherson* v. *Cameron*, 15 U. C. Q. B. 48).

be. It is said that the defendants had no notice of the purpose for which the hops were sent to London, but I think that they must have known that they were sent for one of two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that *Hadley* v. *Baxendale* (1854), 9 Ex. 341, has no bearing on this case ; and I think *Smeed* v. *Foord* (1859), 1 E. & E. 602, was correctly decided" (*Collard* v. *South Eastern Rail. Co.* (1861), 7 H. & N. 79, at p. 86 : *Martin*, B.).

Loss of Season.

2. "Two questions of law were raised during the argument on the part of the defendants. The first was, whether in a case like this, of an action against a common carrier for negligence in not delivering goods intrusted to him within a reasonable time, the consignee has a right to claim in the shape of damages the profit he would have made upon the sale of them if they had been delivered in proper time. We are all of opinion that he is not. Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered. I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise, great injustice would be done ; for instance,—to put a familiar case, —suppose a tradesman at a fashionable watering-place sends an order to a warehouseman in London for a quantity of ribbons or other fancy goods, and they are delivered to a carrier so that they ought to reach him at the beginning of the season, and through the negligence of the carrier their delivery is delayed until the season is over, so that the opportunity for offering them for sale is lost, and, as their novelty or fashion are gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence ?" (*Wilson* v. *The Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N.S.) 632, at pp. 642, 643 : *Williams*, J.).

Loss of Season—No Market.

3. Plaintiffs were woollen merchants, and for the purpose of their business they were in the habit yearly of causing pattern goods to be made. The traveller of the plaintiffs delivered a parcel containing a set of samples of such patterns to the agent of the defendants at Milan, who was informed of the contents of the parcel, and it was forwarded to Basle. Thence it was sent by the

defendants to Galashiels in Scotland on July 14th, and a post card was dispatched to the plaintiffs stating that the goods were due on July 21st. The parcel was not tendered to the plaintiffs till September 9th following, and was refused by them.

"I think this case is within *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N.S.) 632. These goods were delivered to the carriers under a denomination which the learned judge has found would inform them that there was a commercial necessity that the goods should be delivered in a reasonable time. They were not so delivered, and the question is what is to be the measure of damages. In *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N.S.) 632, the question arose as to the recovery of damages for a delay by which the plaintiff lost the season. The learned judge who tried the case had told the jury that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time, and it was laid down by the Court of Common Pleas [at p. 642] that if the meaning of loss of season was that 'the goods by reason of their not having been delivered in due time had become lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value,' then there was not any mistake in point of law in the direction of the learned judge. If it is right here to say that the railway company were bound to know that late delivery of the samples might have the effect of their being left on the consignee's hands at a time when their value to him would be lessened, then these remarks apply to this case. The cases in which the court are bound to consider the market value of the goods are those in which the plaintiff can go into the market and supply himself. If he cannot do so that measure of damages cannot be applied. Here the plaintiffs could not have supplied themselves with the like goods in the market, and the test of damage to be applied is that laid down in *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N.S.) 632, within the principle of which this case falls" (*Schulze* v. *Great Eastern Rail. Co.* (1887), 19 Q. B. D. 30, at pp. 31, 32: Lord *Esher*, M.R.).

(b) Causa Causans and Causa Proxima.

In jure non remota causa sed proxima spectatur.

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself

with the immediate cause, and judgeth of acts by that, without looking to any further degree" (Bac. Max. Reg. 1).

Immediate Cause.

1. "In this case the immediate cause of the loss was the violence of the winds and the waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These, and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. I cannot distinguish this case from that of *Busk* v. *The Royal Exchange Association Co.* (1818), 2 B. & Ald. 73; there, the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here, the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable for the loss that has arisen in this case" (*Walker* v. *Maitland* (1821) 5 B. & Ald. 171, at pp. 174, 175: *Abbott*, C.J.).

2. "The cases of *Busk* v. *The Royal Exchange Assurance Co.* (1818), 2 B. & Ald. 73 and *Walker* v. *Maitland* (1821), 5 B. & Ald. 171, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners" (*Bishop* v. *Pentland* (1827), 7 B. & C. 219, at p. 223: *Bayley*, J.).

3. "No doubt the rule of our law is that the immediate cause, the *causa proxima*, and not the remote cause, is to be looked at: for, as Lord *Bacon* says: 'It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree'" (Bac. Max. Reg. 1 (*Sneesby* v. *Lancashire and Yorkshire Rail. Co.* (1874), L. R. 9 Q. B. 263, at p. 267: *Blackburn*, J.)).

4. As to damages for a passenger's inconvenience, illness and its consequences, due to a carrier's breach of contract, see *Hobbs* v. *London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111, commented on in *McMahon* v. *Field* (1881), 7 Q. B. D. 591. See also *ante*, p. 570, (e) Punctuality of Carrier.

Loss occurring while Wrongful Act is in Operation.

No wrongdoer can be allowed to apportion or qualify his own wrong ; and if a loss actually happens whilst his wrongful act is in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done.

Deviation, no Natural or Necessary Connection with the Loss.

The plaintiff delivered to the defendant on board a barge, 114½ tons of lime to be carried by defendant from Bewly Cliff to the Regent's Canal. (169)

There were, in this case, two points for the determination of the

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(169) It is not deviation for a coasting vessel on a voyage from Mahone Bay to Fortune Bay in Newfoundland, and thence, etc., to put into an intermediate port overnight to escape threatened bad weather (*Wienhauer et al* v. *Nova Scotia Marine Insurance Co.*, 24 N. S. Reps. 205).

"I think that looking at the bill of lading, and considering its terms only, the presumption would be that a direct voyage from Port Credit to Quebec was intended. Such is the natural import of the terms, and such, therefore, must *primâ facie* be taken to have been the intention of the parties. But if it was shown that there was a usage to stop at intermediate places, as is the case with our lake steamers generally, or if personal knowledge could be brought home to the shipper that stopping at intermediate places must have been intended in order to complete the loading of the vessel, then, I apprehend, the presumption arising from the language of the bill of lading would be qualified. For a usage of trade must be assumed to be known to the shipper, and if known, or if he knew the intention to exist that the vessel should visit intermediate ports, the contract must, I apprehend, be construed accordingly. But the existence of such a usage, or of such knowledge are really matters of fact to be determined by the jury. If not established, it appears to me the going to Oswego would be a deviation and would entitle the plaintiff to recover" (*Wright* v. *Holcombe*, 6 U. C. C. P. 534 : *Draper*, C.J., *ante*, p. 606).

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence ; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss (*Spinney et al* v. *Ocean Mutual Marine Insurance Co.*, 17 S. C. R. 326).

court; the first was whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action.

"As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

"Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

"But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker* v. *James* (1814), 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

"The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

"But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case" (*Davis* v. *Garrett* (1830), 6 Bing. 716, at pp. 722, 723, 724: *Tindal*, C.J.).

In a bill of lading or a charter-party, the rule is to look at the the *causa causans* and not the *causa proxima;* but this rule is, after all, subordinate to the true construction of the contract, and ought not to be applied so as to defeat the intention of the parties as therein expressed. (170)

1. "In a bill of lading as distinguished from a policy of insurance we are entitled to look at what was the real cause of the loss, that is, as it is expressed in our legal phraseology, we may look at the *causa causans* instead of merely looking at the *causa proxima*; and where a collision has happened and the negligence of those on board the carrying ship was the real substantial cause of the loss, a court of justice may hold that it was a loss by the negligence of the captain and crew. Although a collision may have been the immediate cause of the loss, yet on looking at the *causa causans* it is a loss by reason of negligence. It was held in the case of *Lloyd* v. *General Iron Screw Collier Co.* (1864), 3 H. & C. 284, which is really the ruling case with regard to the question of collision and the exception of collision, that a court of justice might look at the *causa causans*" (*Chartered Mercantile Bank of*

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(170) "The well established rule of construction applicable to all deeds and written instruments, and especially to policies of marine insurance which are mercantile deeds not prepared by lawyers, is that they should be so interpreted, if possible, as to be valid and effectual, and not in such a way as to be void" (*British-American Insurance Co.* v. *Law*, 21 S. C. R.: *Strong*, J., at pp. 327 328).

"I do not find any distinction in construing charter-parties of vessels from other contracts, and the lease of a ship with covenants would be construed the same as a lease of any other description of property. Under the covenant, therefore, to return the vessel in good condition, reasonable wear and tear excepted, if there had been a total loss of all, I have no doubt the lessee would have been bound to make it good. This implies the obligation on the lessee to insure unless he chooses to be his own insurer" (*Anglin* v. *Henderson*, 21 U. C. Q. B. 31: *Burns*, J., and see *ante*, pp. 31, 227).

India v. *Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, at p, 531 : *Brett*, L.J.).

2. "I am aware that in questions arising on bills of lading and charter-parties the rule is to regard the *causa causans* rather than the *causa proxima*, and that there is a difference in this respect between such documents and policies of insurance. But this rule is after all subordinate to the true construction of the contract, and ought not to be applied so as to defeat the intention of the parties as therein expressed. For example, if the *Atjeh* had been owned by strangers, and the collision had been caused wholly by the negligence of her captain, the loss of the plaintiffs' goods would, as between them and the defendants, be regarded as a loss by collision within the true meaning of the bill of lading and not as a loss by an unexcepted peril, viz., the negligence of the captain of the *Atjeh*. This illustration shews that the liability of the carrier turns on the true construction of the contract, and that the distinction between *causa proxima* and *causa causans* is not the test of liability. The word 'collision' may cover both or only the first according to the meaning of the parties as expressed in the contract" (*ibid.*, at pp. 543, 544 : *Lindley*, L.J.).

3. "Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception" (*Wilson, Sons & Co.* v. *Owners of Cargo per The Xantho* (1887), 12 App. Cas. 503, at p. 510 : Lord *Herschell*). See also *ante*, pp. 661, 662. (171)

Canadian Cases.

(171) A vessel insured for a round voyage is bound to be sufficiently seaworthy at its inception to make it without repairs in the absence of any damage from extraordinary perils of the sea (*Reed* v. *Phillips*, 13 N. B. R. 172).

"Seaworthiness is a relative term ; the deck cargo which might be entirely too much for a vessel to cross the Atlantic with, might also be a perfectly safe one for a vessel running along the coast where harbours of refuge are constantly accessible" (*Cameron* v. *Domville*, 17 N. B. R. 653 : *Duff*, J.).

(c) Insurance Money.

Difference between Life, Fire, and Marine Insurances. (172).

"The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. This species of assurance in no way resembles a contract of indemnity. Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured in their buildings, ships and effects" (*Dalby* v. *The India and London Life Assurance Co.* (1854), 15 C. B. 365, at p. 387 : *Parke*, B.). (173)

Canadian Cases.

(172) "No doubt a party cannot procure one, in whose life he has no legal interest, to insure it with his money and for his benefit, still, if there is an interest at the time of the policy, it is not a wagering policy, and where a life policy, effected by one who has an interest, is assigned, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration ; for it has been decided that he stands on the rights of the party who effected the insurance. The want of interest applies to the original parties to the policy, not to their assignees" (*Vezina* v. *The New York Life Insurance Co.*, 6 S. C. R. 43 : *Ritchie*, C.J.).

(173) "The jury, under the direction of the learned chief justice, deducted from the amount of the damages which they allowed for the death of the husband and father, the amount of a policy of insurance on his life. This notion appears to have been derived from a judgment of Lord *Ellenborough*, in a case of *Goodsall* v. *Boldero*, 9 East, 72, which was acted upon as law without question for many years, but it was at last called in question and the fallacy pervading it was exposed by the case of *Dalby* v. *The India and London Life Assurance Co.*, 15 C. B. 365. Deducting the amount of the policy in this case from the damages allowed for the death of the deceased, seems to me to treat it as an indemnity to the railway company, and leads to absurd consequences" (*Beckett* v. *Grand Trunk Rail. Co.*, 15 O. R. : *O'Connor, J.*).

On appeal to the Court of Appeal for Ontario, 13 O. A. R. 174, the court was divided, and an appeal having been taken to the Supreme Court, 16 S. C. R. 713, it was held that the judgment of the Divisional Court restoring the deducted amount should be affirmed and the appeal dismissed.

An Accidental Insurance is not one of indemnity, and the Insurance Money thereunder is not to be Deducted from Damages for an Injury.

"If a man is injured on a railway through the company's negligence, he is not to have less because he has insured himself against accident. He pays his premiums in order to get back an equivalent; and if he is liable to have the amount of his insurance deducted he loses the benefit of the premiums paid. It is said that he is only actually damaged beyond the amount of the insurance, but according to *Dalby* v. *The India and London Assurance Co.* (1854), 15 C. B. 365, insurance is not a contract of indemnity. The plaintiff is entitled both to the insurance money and compensation. He gets his insurance money under a contract as a *quid pro quo*, having paid his premiums for it; and he is entitled besides to compensation from the company for the legal injury they have committed" (*Bradburn* v. *Great Western Rail. Co.* (1874), 23 W. R. 48: *Bramwell*, B. [This case is also reported in the Law Reports (10 Ex. 1), but there the judgment is not so full.]

"*Yates* v. *Whyte* (1838), 4 Bing. N. C. 272, decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect of such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity, and the insurers might have recovered over from the plaintiff. The decision in the case, however, and in that of *Mason* v. *Sainsbury* (1782), 3 Doug. 61, itself cited with approbation in *Yates* v. *Whyte*,—both stand on grounds independent of this consideration. But, whatever weight may be due to this consideration, the case of *Bradburn* v. *Great Western Rail. Co.* (1874), L. R. 10 Ex. 1, cannot be so qualified. That was an action for injuries in a railway accident: it was held that, in estimating the damages, the defendants could not take into account the amount which the plaintiff received from an accidental insurance policy. There, the contract was not one of indemnity. The judges (*Bramwell*, *Pigott* and *Amphlett*, BB.) held that the contract into which the plaintiff had entered was that, in consideration of the payment of premiums, he (the plaintiff) should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendants' default. But the benefit could not be deducted from the damages for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in

point against the defendants in the case before us" (*Jebsen* v. *East and West India Dock Co.* (1875), L. R. 10 C. P. 300, at p. 305: *Denman*, J., reading the judgment of the court (Lord *Coleridge*, C.J., and *Grove* and *Denman*, JJ.).

Bailees have an insurable interest and should insure the goods held by them as bailees as goods held by them in trust. (174)

"In those cases (*Waters* v. *Monarch Life Insurance Co.* (1856), 5 E. & B. 870 [a case of warehousemen and wharfingers] and *London and North Western Rail. Co.* v. *Glyn* (1859), 1 E. & E. 652 [a case of common carriers] goods held by the plaintiffs as bailees were insured by them under policies the conditions of which provided that goods held in trust would not be covered by the policies unless they were insured as such. The goods accordingly were insured expressly as goods held in trust by the assured. The offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover the amount of such liens. But the court held in each case that the plaintiffs were entitled to recover to the full amount

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Canadian Cases.

(174) "The only ground upon which the verdict can be set aside in this case is the want of an insurable interest in the plaintiffs. They are merchants doing business in Halifax, and agreed with one M. of St. George's Bay, Newfoundland, to sell and ship to him certain goods which he ordered; they were accordingly shipped on the steamer *Maud* bound for that place, which, after leaving the port, was never heard of. The plaintiffs took a bill of lading from the master in the usual form, the goods under it being deliverable to the shipper's order, one of the copies of which was given to M., or sent to him by the vessel. The insurance was effected by the plaintiffs on the goods as their property and for their protection; it was, therefore, necessary for the plaintiffs on the trial to show that they possessed such an interest in the goods as was insurable, and as all the circumstances connected with the transaction were within their personal knowledge, and they were both examined and they alone on this branch of the case, the court had a right to expect clear and satisfactory proof that the goods were theirs or that they had such an interest in them as enabled them to insure them for their benefit; but after carefully considering the evidence of the plaintiffs themselves, I can come to no other conclusion than that when the goods had been shipped and had proceeded on their voyage, the plaintiffs had parted with all their interest in them, the vendee having become the owner, and that they were then at his risk. The real question for our consideration is, at whose risk were they during their transit, and this appears to me the view taken of the matter by both the vendors and the vendee, and on which they acted, the vendors looking since the loss to the vendee for payment, and the latter recognising his liability by paying or settling for them" (*Pugh* v. *Wylde*, 2 Russell & Chesley (N. S. Reps.): *Ritchie*, J., at pp. 179, 180; and see *Outram* v. *Smith*, 2 Russell & Chesley (N. S. Reps.) 187; *Merchants' Marine Insurance Co.* v. *Rumsey*, 9 S. C. R. 577).

Freight as a matter of insurance, means the benefit derived by the shipowner from the employment of the ship; and the contract of insurance against loss

insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected" (*North British Insurance Co.* v. *Moffatt* (1871), L. R. 7 C. P. 25, at p. 31 : *Keating*, J.).

The principle of the same two cases was relied on by *Bovill*, C.J., in *Ebsworth* v. *Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596, at pp. 615, 616, 617.).

Canadian Cases.

of freight is that the ship shall not be prevented from earning it by the perils insured against. The owner of a vessel is *primâ facie* entitled to her freight (*Driscoll* v. *Melville*, 23 N. B. R. 160).

"The question arising in the case may be determined wholly upon the authority of *Holroyd* v. *Marshall*, 10 H. L. 191. Lord *Westbury* there lays it down as an elementary principle long settled, that in equity it is not necessary for the alienation of property that there should be any formal deed of conveyance, that a contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract be such as a court of equity will decree a specific performance of. Now, applying the principles here laid down to the present case, there can be no doubt, that immediately upon the first advance being made by the plaintiff under the contract with *Bishop*, the beneficial interest in the vessel then on the stocks was, in equity, transferred from Bishop to the plaintiff by way of security to the latter for his advances, and such interest increased in value from day to day as the vessel progressed and became a security to the plaintiff for all his advances from time to time, as they were made. That interest was one which, relating as it did to a specific chattel, was such that a court of equity would have secured the benefit of it to the plaintiff by specific performance, or by injunction restraining Bishop from dealing with the vessel otherwise than in accordance with his contract with the plaintiff. This is a proposition which at the present day, cannot admit of a doubt, and as an equitable interest is sufficient to create an insurable interest, the plaintiff at the time of the insurance being effected and at the time of the loss had an insurable interest in the subject of the insurance under the circumstances established by the evidence" (*Clarke* v. *Scottish Imperial Insurance Co.*, 4 S. C. R. 192 : *Gwynne*, J.).

SECTION XVIII.

DEMURRAGE. (175)

(a) *Definitions*, p. 682.
(b) *When "lay days" commence*, p. 686.
(c) *Rights and liabilities of shipowners and charterers and shippers as to loading and unloading*, p. 688.
(d) *Consignee's liability to pay demurrage*, p. 698.

(a) Definitions.

Demurrage.

"Demurrage is the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at

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(175) "The respondent's (plaintiff) vessel, the *Whickham*, was chartered by the appellants (defendants) for a voyage from Montreal to the United Kingdom or Continent. The ship was to load with a cargo of wheat, maize, peas, and rye. The only portion of the charter-party bearing on the present case is the clause which provides that the ship should be loaded as fast as the cargo can be received in fine weather. The ship was to have an absolute lien on the cargo, dead freight, and demurrage. Should ice set in during the loading so as to endanger the safety of the ship, the master to be at liberty to sail with part cargo and have leave to fill up at any open port on his way homeward for the ship's benefit.

"The ship left before receiving a full cargo under the provisions of the charter-party by reason of the danger she was in from ice. The defendants contend that the delay was not due to them, but to the ship. The claim in this case is for dead freight and demurrage. The claim for dead freight arises in consequence of failure to furnish a full cargo. Dead freight denotes a sum agreed to be paid in respect of space not filled according to charter-party or damages provided for by the charter-party, in the event of the freighter not loading a full cargo. It is defined to be simply 'an unliquidated compensation recoverable by the shipowner from the freighter for a deficiency of cargo,' and again, 'for the loss of freight, recoverable in the absence, or place of freight.' In this case the freighter agreed to load a full and complete cargo, and therefore he must have known that if he failed to perform his agreement, he would be liable to the shipowner in damages, under the name of dead freight.

"Without occupying time in going over the evidence in detail, I think it shows that had the cargo been supplied, and the vessel loaded, from the time she was ready to take in cargo, or from the 16th, as fast as she could have received it, she would have been loaded with a full and complete cargo before six a.m. of the 21st, when she sailed.

"As to the vessel sailing at the time she did, the provision is: 'Should ice set in during the loading so as to endanger the ship, the master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on

either the commencement or the end of the voyage" (*Harris* v. *Jacobs* (1885), 15 Q. B. D. 247, at p. 251 : *Brett*, L.J.).

"*Lay days*," "*Demurrage days*," "*Days*," "*Working days*," "*Running days*" *explained.* (176)

"There must be a stipulation as to the time to be occupied in the loading and in the unloading of the cargo. There must be a time, either expressly stipulated, or implied. If it is not expressly stipulated, then it is a reasonable time which is implied by the law; but either the law or the parties fix a time. Now, when they do fix a time, how do they fix it? Why, they allow a certain number

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the way homeward for ship's benefit.' This clearly shows that if there were no laches on either side, but should ice set in, as mentioned, before a full cargo was loaded, then neither party could have any claim on the other, neither party being to blame; and the shipowner would be entitled to freight on the cargo she was in a position to avail herself of at any open port for ship's benefit. The evidence clearly shows that the ship was entirely justified, from the state of the weather, in leaving at the time and under the circumstances she did. I do not think that the exercise of the option to leave without a full cargo by any means absolved the appellants from their obligation fully to load the ship, for their failure to do so arose from their own laches" (*Lord* v. *Davidson*, 13 S. C. R. 166 : Sir *W. J. Ritchie*, C.J.).

(176) By a charter-party, fifteen working days were to be allowed the charterer for loading, and fifteen like days for discharging, but if through any fault of the charterer the vessel should be longer detained, demurrage was to be paid at the rate of threepence per register ton per day, any time lost through frost, etc., either in loading or discharging, excepted. It was held that the cesser clause giving a lien for demurrage covered detention in loading as well as in discharging, and therefore exempted the charterer from liability therefor (*Lovitt* v. *Snowball*, 32 N. B. R. 217).

In computing demurrage, Sunday is to be reckoned as one of the days to be allowed for. "Days" means the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed (*Gibbon* v. *Michael's Bay Lumber Co.*, 7 O. R. 746).

"I am of opinion that the refusal of the master of the *Maggie* to work upon that day has no effect upon the claim for demurrage. When Sunday is not computed as one of the demurrage days, it is not because in England or in this country work is prohibited to be done upon that day, but because by the contract it has been expressly excluded from the computation named, or by the time being restricted to working days; and it is, as the cases already referred to show, computed as a demurrage day, although the law will not suffer the work either of loading or unloading to be done upon that day" (*ibid.* : *Wilson*, C.J.).

Defendant, the owner of wheat shipped, shipped it on board the plaintiff's vessel, consigned to Montreal. The bill of lading made the freight payable by the consignee, but contained nothing as to the days allowed for

of days, during which, although the ship is at the disposal of the charterer to load or to unload the cargo, he does not pay for the use of the ship. That is the meaning of 'lay days.' It is a stipulation always in favour of the charterer. Now the days, which are given to the charterer in a charter-party, either to load or to unload without paying for the use of the ship, are 'lay days.' Other days are sometimes given also in favour of the charterer, which are called 'demurrage days.' Those are days beyond the lay days, but during which the amount that he has to pay for the use of the ship is a fixed sum, not necessarily what it costs the owner to keep his ship, but a fixed sum, which is usually about what it is supposed it costs the owner to keep the ship. This stipulation also is in favour of the charterer, because instead of being involved in a dispute as to what he would have to pay for the days during which the ship is kept idle, a sum is fixed, and he knows what he has to pay if he keeps the ship beyond the lay days. Those are the 'demurrage days.' If he keeps the ship beyond the lay days, when he pays nothing, and only the number of demurrage days, he pays a fixed sum for demurrage. If he keeps the ship after that, it is a question of damages, and he does not know what he has to pay until the question is settled by a tribunal or by agreement.

"We have here to deal with lay days. 'Lay days' are described in a charter-party in various ways; sometimes certain days are fixed for loading and unloading. If these days are described simply as 'days,' then, although they are not so called when they are said to be for loading or unloading, nevertheless they are 'lay

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unloading or demurrage. The vessel was delayed at Montreal several days in transferring the wheat into a ship on which the consignee had ordered the plaintiff to put it on board; and the plaintiff having sued upon a contract by defendant to receive the wheat from him within a reasonable time after arrival, obtained a verdict:—*Held*, that such a contract was to be implied from the bill of lading and evidence, and the verdict was upheld (*Kemp* v. *McDougall*, 23 U. C. Q. B. 380).

"In this case the bill of lading constitutes the whole contract, and it says nothing on the subject of lay days, or days for unloading or demurrage. The consignee, therefore, by accepting the goods entered into no contract and incurred no liability beyond what was there expressed, and could not be made liable for the demand in this action. Unless the defendant is liable the plaintiff has no remedy. The contract certainly is with him, the bill of lading sufficiently establishes that; the question is whether there is not evidence of a contract on the defendant's part to receive the wheat shipped within a reasonable time after the arrival of the vessel in Montreal. He was bound to take notice of the time of her arrival. Arriving at the conclusion that this action is maintainable, and that the damages, under the evidence of detention, are by no means unreasonable, I think the rule should be discharged" (*ibid.*: *Draper*, C.J. See also *Brown* v. *Ross*, 5 U. C. Q. B. 469; *Barker* v. *Torrance*, 30 U. C. Q. B. 43; 31 U. C. Q. B. 561; *Burnett* v. *Conger*, 23 C. P. 590).

days.' 'Days' and 'lay days' are really the same in a charter-party. 'Days' or 'lay days' may be calculated in a different manner. They may be described, and sometimes they are described, in a charter-party as days of so many working hours. Then the number of days is fixed, but the length of each day is also fixed. The days may be described as 'working days.' Now 'working days,' if that term is used in the charter-party, will vary in different ports; 'working days' in the port of London are not the same as working days in some other ports, even in England; but working days in England are not the same as working days in foreign ports, because working days in England by the custom and habits of the English, if not by their law, do not include Sundays. In a foreign port working days may not include saints' days. If it is the custom or the rule of the foreign port that no work is to be done on the saints' days, then working days do not include saints' days. If by the custom of the port certain days in the year are holidays, so that no work is done in that port on those days, then working days do not include those holidays. Working days in an English charter-party, if there is nothing to shew a contrary intention, do not include Christmas Day and some other days, which are well known to be holidays. Therefore 'working days' mean days on which, at the port, according to the custom of the port, work is done in loading and unloading ships, and the phrase does not include Sundays.

"Merchants and shipowners have thought that this arrangement was not satisfactory to them, and that the lay days ought to be counted irrespectively of that custom, so that the charterer should take the risk whether work is done on Sundays or holidays at the ports. They, therefore, introduced a new term, which is 'running days.'

"Now 'running days' were put in really as a mode of computation to be distinguished from 'working days.' 'Days' were distinguished from 'working days.' 'Days' include every day. If the word 'days' is put into the charter-party—so many days for loading and unloading—and nothing more, that includes Sundays and it includes holidays. 'Working days' are distinguished from 'days.' But I suppose and take it, that there might be another dispute as to what 'days' would mean. If 'days' are put in, there is sure to come some discussion about what is the length of the day during which the charterer is obliged to be ready to take delivery or the shipowner to deliver, because the length of days may vary according to the custom of the port. In some countries, for anything that I know, the custom of the ports may be to work only four hours a day, and if 'days' are put into the charter-party, there may be a dispute—although I do not say it would be a valid contention according to English law—whether the day included more than four

hours. And merchants and shipowners have invented this nautical term, about which there can be no dispute. They have invented the phrase 'running days.' It can be seen what it means. What is the run of the ship? How many days does it take a ship to run from the West Indies to England? That is the running of the ship. The run of a ship is a phrase well known. What are 'running days'? It is a nautical phrase. 'Running days' are those days, on which a ship in the ordinary course is running. It is true that when they are lay days, they do not take effect under the charter-party until the ship has done running; but the parties are describing the days about which they are talking, namely, days in a port, according to the phraseology which they use with regard to a ship at sea. 'Running days' therefore mean the whole of every day when a ship is running. What is that? That is every day, day and night. There it is as plain as possible. They are the days, during which, if the ship were at sea, she would be running. That means every day. Now Lord *Abinger*, C.B., in *Brown* v. *Johnson* (1842), 10 M. & W. 331, at p. 334, pointed out that 'days' inasmuch as they are working days, do in point of fact mean the same as 'running days,' because if so many days for loading and unloading are mentioned in a charter-party, not only working days are intended but every day, including Sundays and holidays. Therefore, 'running days' comprehend every day, including Sundays and holidays, and 'running days' and 'days' are the same" (*Nielsen* v. *Wait* (1885), 16 Q. B. D. 67, at pp. 70, 71, 72, 73: Lord *Esher*, M.R.).

(b) When "Lay Days" commence. (177)

i. Where Port for Loading is Named in the Charter-party.

ii. Where Port for Loading is to be Named by Charterers.

"The rule is, that when a port is named in the charter-party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that

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(177) In an action to recover demurrage under a charter-party in writing, it was held that the words "lay days to count when the ship is ready in a proper loading or discharging berth respectively" mean when the vessel is at the port named, has discharged ballast, and the master has given notice to the charterer that he is ready to receive cargo; whereupon, it is the duty of

she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port. Now, by this charter-party, the vessel was to proceed to any Liverpool or Birkenhead dock as ordered by the charterers. The charterers were to have the selection of the dock, and they accordingly selected the Wellington Dock. It seems to me that the effect of such selection was precisely as if that dock had been expressly named in the charter-party originally, and the agreement had been that the vessel should proceed direct to the Wellington Dock, and when there should load in the usual and customary manner" (*Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46, at p. 52: *Bovill*, C.J.).

"The present case is one in which an option is given to the charterer to do that which the charter-party has not done, that is, to name the terminus of the voyage, and a broad proposition has been put forward that as soon as the ship is at the disposition of the charterer the voyage is at an end. The words of this proposition are full of ambiguity. If it means that as soon as the ship arrives at the place where the charterer is to exercise his option, the demurrage days begin, the proposition is too large. The time at which the charterer is in this case to name a berth for the unloading of the ship is on her arrival at the Garston Dock, but it may well be in other cases that at the time when the option is exercised the place to be named may be at a distance from where the ship is, and it could not be in such a case that the duty to unload should commence at once. If the time meant is when the ship is placed at the disposal of the charterer for the purpose of unloading, that does not solve the difficulty, but brings us back to the same question—when is the carrying voyage at an end? *Tapscott* v. *Balfour* (1872), L. R. 8 C. P. 46, laid down clearly that where the place at which the carrying voyage is to end is not stated in the charter-party, but is to be named by the charterer, the selection of a dock has precisely the same effect as if that dock had been

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the charterer, not the master, to provide a proper loading berth. The words "cargo to be furnished vessel at port of loading as customary" do not mean the ordinary mode in which the charterer loads vessels chartered by him, but the general custom of the port of shipment (*Lovitt* v. *Snowball*, 33 N. B. R. 263).

"The charter-party says that the usual custom of the wood trade is to be observed by each party in cases where not specially expressed. 'Wood trade' here must mean a custom, which is well known to persons generally who are engaged in that business. The usage of the port of Chatham ought not to be binding on contractors who have no knowledge of such a usage" (*ibid.*: *Tuck*, J.).

originally named in the charter-party, and the same principle is applicable to the case before us.

"Then we are told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is one that is reasonably fit for the purpose of delivery" (*Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.*, [1891] 2 Q. B. 647, at pp. 651, 652: *Bowen*, L.J.; cited by *Pollock*, B., in *Bulman and Dickson* v. *Fenwick & Co.*, [1894] 1 Q. B. 179, at p. 183).

(c) Rights and Liabilities of Shipowners and Charterers and Shippers as to Loading and Unloading.

1. "Charter-parties, though all are, as to the majority of the stipulations in them, identical and in a common form, vary in some particulars. The description of the voyages are [*sic*] necessarily various. But they are always described, or ascertained by describing in terms the place where each is to begin, and the place where it is to end. And it is this invariable mode of ascertaining what the agreed voyage is which gives the key to the interpretation of the charter-party as to the time of the accruing of the liabilities as to loading and unloading. It is not invariable that the voyage or voyages which the shipowner undertakes is or are the voyage or voyages on which he is to carry cargo. As, for instance, when he undertakes to sail to a named place, and there load, and thence proceed and carry on cargo to another named place. (178) In such case there is a voyage to the place of loading, which the shipowner undertakes to make, and with regard to which he undertakes liabilities, but on which he carries no cargo. But if the charter is made at a time when the ship is already at the place of loading, the only voyage described is the voyage on which the ship is to carry cargo. The chartered voyage is therefore not necessarily identical with the carrying voyage. Charter-parties also differ in this, that in some of them lay days and demurrage days are

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(178) If a vessel be chartered to proceed from Halifax to Montreal, and then to load return cargo, and thence to proceed to St. John's, Newfoundland, or to Halifax, and, if ordered, to go to St. John's, there to discharge cargo, and load a return cargo for Halifax, it will be construed as one voyage (*Levatte* v. *Salter*, Thomson's N. S. Reps. 387).

specified ; in others no mention is made of such days. Questions arising as to the commencement of the liability in respect of loading and unloading, and such is the question in this case, refer to,

"1, the rights of the shipowner with regard thereto,

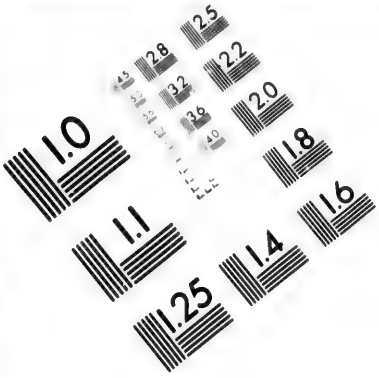
"2, his liabilities,

"3, the rights of the charterer, and

"4, his liabilities.

"I will consider first the rights and liabilities of both parties as to loading.

"The first right of the shipowner is the right of placing his ship at the disposition of the charterer, so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charter-party as the place whence the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space, in several parts of which a ship may load, as a port or dock ; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay berth, or a particular part of a port or dock. If when the charter is made the ship is already in the place named, the shipowner may place the ship at the disposition of the charterer as soon as the ship is ready, so far as she is concerned, to load by giving notice thereof to the charterer. If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded ; but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated. If the ship is not, when the charter is made, at the port or place where she is to load, the form of the charter-party is, 'That the said ship, being at' (the place where she then is), 'shall proceed, etc., to' (the place named as the beginning of the carrying voyage), 'or so near thereunto as she can safely get, and shall there load, etc., and proceed thence, etc.' In this case also the named place whence the carrying voyage is to begin, though the carrying voyage is not the whole chartered voyage, may, as before, describe a larger or more limited space. If it describes a larger place, as a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship



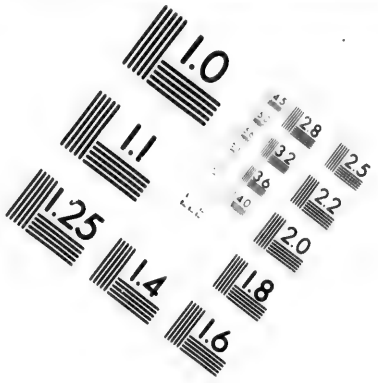
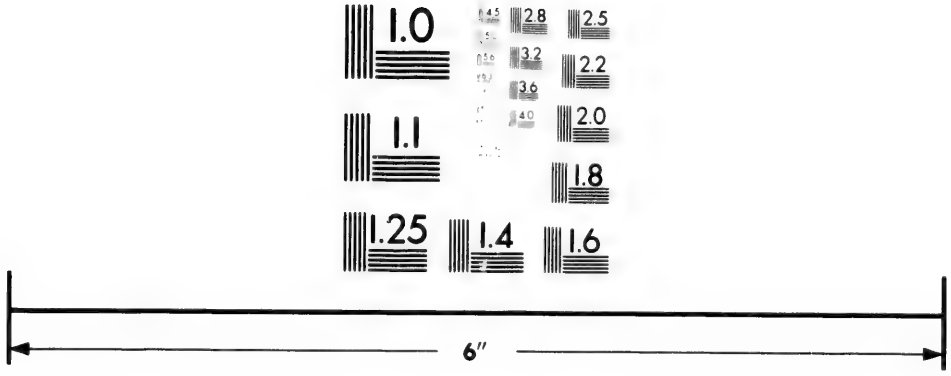
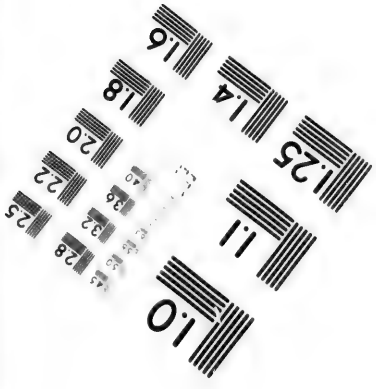
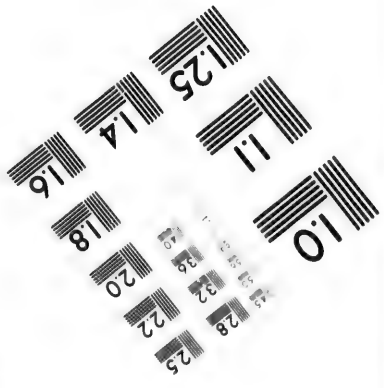


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arrives at that named place, and, so far as she is concerned, is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded ; but, in the absence of his right to place his ship only as near to the named place as she can safely get, which is a stipulation to be discussed hereafter, he cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading until the ship is at the named place, or the place which by custom is considered to be intended by the name ; as, if a larger port be named, the usual place in it at which loading ships lie. If it describes a more limited place, as a quay or quay berth, or a particular part of a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship is arrived at that place ready, so far as she is concerned, to load, but not until the ship is at that place. The further right of the shipowner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be, which attaches when and after the ship is duly placed at his disposition. The liability of the shipowner as to the commencement of the loading depends on the particular form by which he has bound himself to place his ship at the disposition of the charterer for that purpose. He must do so 'with all convenient speed,' or 'with all possible despatch,' or 'immediately, unless prevented by enumerated accidents,' or 'within a reasonable time,' according to his agreement in each case. If he fails to satisfy this liability an action may be maintained against him—as, for instance, an action for a deviation in the preliminary voyage (179).

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(179) "The charter was to load a full and complete cargo, to consist of deals and battens, and not exceeding five per cent. of boards. There was nothing whatever on the face of the charter-party to show or suggest that either party, when entering into the charter-party, had in view any particular deals or battens. The terms of the charter-party would have been complied with by a cargo of any deals and battens, provided only a full and complete cargo was furnished. *Vide Jones* v. *Holm*, 1 L. R. 2 Exch. 335" (*Schofield* v. *Carvill*, 21 N. B. R. 558 : *Duff*, J., *ibid.*).

"The voyage that this ship engaged to perform, began at Shelburne, and not at St. John. The material part of the charter-party is as follows : 'that she shall proceed with all possible dispatch after arrival at Shelburne to St. John, N. B., etc., and there load a cargo of deals, etc., and shall proceed therewith to Liverpool, G. B., at sixty shillings per standard freight (the act of God, pirates, the Queen's enemies, fire, and all other dangers and accidents of the seas, etc., always mutually accepted). The defendants, in consideration of this, promised to provide the cargo to be so carried, and pay the freight, and the moment the ship left Shelburne on the way to St. John, she had begun the voyage under this charter, and when she arrived at St. John, was

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made ready for cargo. She had performed part of the voyage contracted for, the payment of which, of course, depended upon whether or not she delivered any of the cargo at Liverpool, or the charterers themselves prevented her from completing her voyage. This being so, what would excuse the ship from performing the rest of the work contracted for?

"The rule, I think, is clear, that if the contract contained no exception, the shipowner would be obliged to compensate the defendants for any damage occasioned by his not carrying the cargo, even although the vessel had been totally lost by the perils of the seas. If, as in this case, such perils were excepted, nothing less than total loss would excuse him; or unless under the peculiar circumstances of the case some exceptions were implied, which possibly might arise in cases of contract for carrying particular goods, such as green fruits or other things which could only be carried at particular times, or perhaps when the contract was made to the knowledge of both parties with reference to particular goods, which had to be shipped in some limited time.

"If the defendants did not choose to take the risk of any delay that might be occasioned by the perils of the seas, it was easy to provide against it by a clause authorising cancellation, if she was not ready to receive the cargo before any time that they might think desirable or make the amount of freight depend upon the time she was ready to receive her cargo. If they had sought to introduce such terms, the shipowner might not have agreed to it. This not being so introduced, I think both took the risk and agreed to perform their part of the contract, that is, the ship to proceed to St. John and load the cargo, and if any accident occurred short of the total loss of the ship on the voyage there, the plaintiffs were bound to repair her in a reasonable time, and were allowed all the time reasonably necessary for that purpose, no matter how long that might be, and if they made any unnecessary delay, they were liable to the defendants for all damage occasioned thereby. On the other hand, the defendants were bound to furnish the cargo as agreed" (*ibid.*: *Palmer*, J., pp. 568, 569).

The facts in this case were as follows: By a charter-party of December 11, 1878, it was agreed that plaintiffs' vessel, then on her way to Shelburne, N. S., should proceed with all possible dispatch to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before January 1st, 1879, the charterers were to be at liberty to cancel the charter-party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbour of St. John, she got upon the rocks, and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible dispatch, she was not ready to receive her cargo until April 21st following, prior to which time—on March 26th—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter-party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer, that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market, and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the objects of the voyage. The judge directed the jury, that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the

"The primary right of the charterer as to the loading under a charter-party in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charter-party as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer has notice of both these facts; when these conditions are fulfilled the liability of the charterer begins. The extent of that liability depends on the form as to it of the charter-party. If there be no undertaking that he will load the ship at all events within a specified time, he will be bound to use reasonable diligence to do his part towards the loading according to the terms or meaning of the charter-party; that is to say, 'with all possible despatch,' or 'with usual despatch,' or 'with the customary despatch of the port,' or 'within a reasonable time.' But whenever in the charter-party it is agreed that a

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shipowners and charterers, they should find for the defendants. The verdict being for the defendants, it was held by the Supreme Court, affirming the judgment of the Supreme Court of New Brunswick, 21 N. B. R. 558, that as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract (*Carvill* v. *Schofield*, 9 S. C. R. 370).

"The defendants' contention on their appeal is that the object of chartering was to have the cargo carried in winter, but that when the vessel was ready to receive the cargo, the time for a winter voyage had expired.

"Nothing whatever is said in the charter-party of a winter voyage, nor is any time fixed within which the ship shall be ready to load and sail from St. John. I do not think there is any sufficient evidence to justify the conclusion that in entering into this charter, both parties understood and agreed that it was confined to a winter voyage. Had such been the intention, it should have been so expressed in the charter-party, and there is no implied contract that I can discover, as to when the vessel should be ready to commence the voyage.

"The parties not having expressly provided that unless the vessel was loaded and ready to sail by a specified day, the charter-party would be at an end, as was said in *Dimeck* v. *Corlett*, 12 Moo. P. C. 227, 'Courts ought to be slow to make such a stipulation for them.' I think the question in this case is, was the delay so great as to destroy the voyage or merely to retard it? To enable a charterer to put an end to the contract, the delay must be such as frustrates the object of the voyage; in other words, the voyage both parties contemplated must have become impossible. In this case, the time necessary to get the ship repaired so as to be a cargo-carrying ship, was not, in my opinion, so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers; a voyage undertaken after the ship had been sufficiently repaired, would not, in my opinion, have been a different voyage, either as to the port of loading and discharge, or a different adventure" (*ibid.* : *Ritchie*, C.J.).

A charter-party contained the following clause: "It is agreed that as this charter-party is entered into by the charterer for account of another pa... his responsibility ceases as soon as the cargo is on board, the vessel holding a

specified number of days shall be allowed for loading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain the ship for the purpose of loading beyond those two specified periods. This is the principle laid down in *Ford* v. *Cotesworth* (1868), L. R. 4 Q. B. 127 ; (1870), L. R. 5 Q. B. 544. If the ship in such case is detained beyond the specified lay-days, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in loading has occurred from causes wholly beyond the charterer's control. The rights and liabilities of the shipowner and charterer as to unloading under a charter-party in ordinary terms are very much the same as, though they are not identical, with these respective rights and liabilities as to loading. The right of the shipowner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is to end ; and the ship is ready, so far as she is concerned, to unload. The shipowner, however, is not bound to give notice that his ship is so arrived and is so ready. If the named place describes as before a large space in several parts of which a ship can unload, as a port or dock, the shipowner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, or the place which by custom is considered to be intended by the name, and is ready, so far as the ship is concerned, to discharge, though she is not in the

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lien on the cargo for freight and demurrage ; the usual custom of each port is to be observed by each party in cases where not specially expressed ; cargo to be delivered at St. John as fast as required ; cargo to be delivered alongside vessel at St. John at shipper's risk and expense, and twelve running days for discharging cargo ; demurrage at the rate of 10*l.* sterling a day if longer detained." The ship was made ready to receive cargo, and the defendant was duly certified of this. The ship was loaded, and bills of lading signed according to the charter-party. There was delay in loading owing to the defendant not supplying cargo as fast as required. It was held that the defendant was liable for damages for the delay caused by his not delivering the cargo as fast as required, and that the clauses for lien and exemption did not apply to damages for delay in loading at the port of loading, that the defendant having once had notice that the vessel was ready to receive cargo, he was bound to furnish it without further demand or request as fast as it was required for loading, and so that the ship should not be delayed for want of it (*Schofield et al* v. *Gibson*, 17 N. B. R. 619).

"Where the charter-party contains words that the loading is to done without delay, or as fast as it can be taken on board—no time being named, or a certain quantity taken in per day—then no days are clearly fixed in the charter-party, and that is the case of the charter now under consideration, the cesser clause only applies to the discharging of the cargo" (*ibid.* : *Weldon*, J., at p. 640).

particular part of the port or dock in which the particular cargo is to be discharged. But in the absence of his right to place the ship only as near to the named place as she can safely get, the shipowner's right to have the charterer's liability to unload initiate, does not commence until the ship is in the named place. The liability of the shipowner as to the commencement of the unloading is to use all reasonable despatch to bring the ship to the named place where the carrying voyage is to end, unless prevented by excepted perils, and when the ship is there arrived, to have her ready with all reasonable despatch to discharge in the usual or stipulated manner. If the named place describes a more limited space, as a quay, then the right of the shipowner to have the liability of the charterer initiate does not commence until the ship is at the named place, although the ship is in the port, or dock, or larger space in which the named place is situated. The primary right of the charterer as to unloading is similar to his primary right as to loading, namely, that he cannot be under any liability as to unloading until the ship is at the place named in the charter-party as the place where the carrying voyage is to end, and the ship is ready so far as she is concerned to discharge; or, if the necessary conditions are fulfilled, he may, as a substituted liability, be liable when the ship is as near to the named place as she can safely get. But when the ship is at the named place, or the substituted place, and is ready to discharge, the liability of the charterer as to the unloading commences. And here again the extent of his liability depends on the form as to it of the charter-party. If there be no undertaking that he will discharge the ship at all events within a specified, that is to say, a described time, he will be bound to use reasonable diligence to do his part towards the unloading, according to the terms or meaning of the charter-party. That may be 'with all possible despatch,' or 'with usual despatch,' or 'with the customary despatch of the port,' or 'within a reasonable time.' But if there be a stipulation, express or implied, on the part of the charterer that he will not detain the ship for the purpose of unloading beyond a specified time (and there is such a stipulation when lay-days are allowed for unloading and demurrage-days on payment of a daily sum), and if the ship be in fact detained beyond the lay-days after she has arrived at the place named for the end of the carrying voyage, and is there ready so far as she is concerned to unload, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in unloading has occurred from causes wholly beyond the charterer's control. In either form of naming the places at which the voyage is to begin and end, it follows from the very form of the agreement, which fixes what the voyage is by naming the

places at which it is to begin and end, that the carrying voyage does not begin until the ship is at the place named as the place where it is to begin, and the carrying voyage does not end until the ship is at the place named as that where the voyage is to end. It would be a contradiction of the whole substance of the contract to carry on a voyage, to say that the charterer is bound to load before the ship is at the place whence the goods are to be carried, or that the charterer is bound to receive the cargo before the shipowner has carried it to the end of the voyage for which he is paid to carry it.

"These statements of the law seem to me to be also consistent with and to be the result of all the cases" (*Nelson* v. *Dahl* (1879), 12 Ch. D. 568, at pp. 580, 581, 582, 583, 584, 585: *Brett*, L.J.).

2. "There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is (as was said by Mr. Justice *Blackburn*, in *Ford* v. *Cotesworth* (1868), L. R. 4 Q. B. 127, at p. 133, 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought (I think) to be taken into consideration" (*Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599, at p. 608: Lord *Selborne*, L.C.). See *Lyle Shipping Co.* v. *Cardiff Corporation* (1900), 69 L. J. Q. B. 93, as to the meaning of "the ship to be discharged with all dispatch . . . customary, weather permitting."

3. "I adopt the view of Lord Justice *Brett* [*Nelson* v. *Dahl* (1879), 12 Ch. D. 568, at pp. 593, 594] that the shipowner must bring his ship to the primary destination named in the charter-party, 'unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character

that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the object of the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable'" (*Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38, at pp. 59, 60 : Lord *Watson*).

4. "It is unnecessary, and it would be pedantic, to repeat the clear and felicitous statements of the law which have been made by learned judges as from time to time they have been called upon to pronounce judgment in cases of this kind. The case of *Nelson* v. *Dahl* (1879), 12 Ch. D. 568 ; *Dahl* v. *Nelson* (1881), 6 App. Cas. 38, contains a valuable epitome of all the previous authorities" (*Pyman Bros.* v. *Dreyfus Bros. & Co.* (1889), 24 Q. B. D. 152, at p. 156 : *Mathew*, J.).

Difficulty of Obtaining Labour.

5. "If the terms of the bill of lading had required the discharge to be effected in any particular number of days it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them [the assignees of the bill of lading], and it would have been no answer to a charge that they had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so.

"The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time" (*Hick* v. *Raymond and Reid*, [1893] A. C. 22, at p. 28 : Lord *Herschell*, L.C.).

The Merchant is not bound to be Ready with his Cargo at all Times, in all Places, and under all Circumstances.

6. "The proposition of law is that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency [of another vessel forfeiting her right to continue at her berth] if it should arise. There is not a fragment of authority for any such proposition. And I can imagine it would be a most serious thing if such a proposition were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that all those twenty or thirty ships (for it is said there were twenty or thirty ships there) were guilty of a breach of an implied duty (the charter-party being in the ordinary form) in not having all their cargoes ready. I think I am entitled to say that no such case has

ever been suggested in the courts" (*Little* v. *Stevenson & Co.*, [1896] A. C. 108, at pp. 116, 117 : Lord *Halsbury*, L.C.).

"The question is whether on these mere facts there was an obligation on the part of the charterer to have the cargo on the quay so that the vessel might have been berthed on the 21st. It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper. My Lords, no authority has been cited for that proposition, and I am of opinion that such a construction of the shipper's obligations would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part, with the view of getting the ship berthed at the earliest period that is reasonably possible ; and it may be that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained" (*ibid.*, at pp. 118, 119 : Lord *Herschell*).

Delivery of Cargo a Joint Operation—Demurrage.

7. "If the written terms of the charter-party ['brought to and taken from alongside the ship at merchant's risk and expense'] stood alone, it has been held (*Petersen* v. *Freebody & Co.*, [1895] 2 Q. B. 294) and I think rightly held, that, upon the true construction of a charter-party in those terms, the delivery of the cargo from the ship into barges or on to a quay is a joint operation, that is to say, neither party is bound to do it alone. It is to be a joint act, and, therefore, if one party is not there to perform his part of it, that prevents the other party from performing his part. Therefore, upon the written terms of the charter-party standing alone, the captain of the ship would not be bound to begin to deliver the cargo into the barges, unless the charterers had men there to assist in the joint operation ; and, if they were not ready and willing to take part in it, the captain being ready and willing to do so, he would be prevented by the default of the charterers from discharging the ship, and demurrage would be payable for the consequent delay. That being the state of things with regard to a charter-party in these terms if they stood alone, a custom appears

to have been evolved among the persons engaged in importing timber cargoes into the Thames by way of addition to the terms of the written contract. If that custom contradicts the express terms of the charter-party, then it is a bad custom so far as it is sought to apply it to a charter-party, in such terms. But, if the custom is consistent with the terms of the charter-party, so that the two may fairly stand together, then the custom must be taken to be incorporated into the written contract, and the court must construe that contract accordingly" (*Aktieselkab Helios* v. *Ekman & Co.*, [1897] 2 Q. B. 83, at pp. 86, 87 : Lord *Esher*, M.R.).

(d) Consignee's Liability to Pay Demurrage.

From the time a ship is at the usual place of discharge the consignee takes the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days.

This doctrine is laid down and upheld by the courts, as the following extracts will show :—

1. The master of a vessel, which was a general ship, having a British licence, took on board at Bordeaux the goods consigned to the several defendants, and also goods for many other consignees, and signed and delivered to each of the shippers a bill of lading, whereby he acknowledged "the shipping on board the *Mariana* of the goods" (describing them), "to be taken out in twenty days after arrival or to pay 4*l.* per day demurrage :" the bill of lading limited the master's responsibility by containing the usual exception of "the act of God, the King's enemies, fire, all dangers of the seas, rivers, and navigation, save risk of boats, so far as ships are liable thereto."

"It is impossible to decide these three very singular cases without being struck with the enormous gain which the owner may get by this bill of lading ; and which may possibly much exceed what in justice and conscience he ought to have. This is a general ship ; 30 or 40 persons may have goods on board, and for every one of them the owner may have his 4*l.* per day. It was said indeed, that in fact the 4*l.* per day for these three persons would not much exceed the fair charge for the demurrage of the whole ship : but it might have happened that many more persons might have become liable, and a much larger profit might have accrued. I was struck very much with the argument, that it was not the fault of the defendant, but the fault of the plaintiff himself, that these goods could not be got out till the other goods which lay above them were delivered. But it is not, in truth, the fault either of the plaintiff or defendant, that the goods could not be taken out. There can be only so many goods at the top of the

vessel as the proper stowage of the goods will allow, therefore all the others must be at the bottom ; and as this is a general ship, and the goods do not all belong to the same consignee, the goods of some of the consignees must be undermost. If this argument would avail, therefore, that the captain is not entitled to demurrage for those goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at the top, but that construction would be contrary to the positive contract ; for it is impossible to get out of the words of this bill of lading, which, although it is a singular species of contract, to bind a consignee by an instrument signed not by himself, but by the captain, yet as the consignors delivered the goods on board under that bill, and the defendants accepted that bill of lading, it is binding upon them, and therefore this action may be sustained on the general count for demurrage" (*Leer* v. *Yates* (1811), 3 Taunt. 387, at pp. 393, 394 : *Mansfield*, C.J.).

2. "The principle on which the consignee is taken, to contract for the freight and demurrage mentioned in the bill of lading applies in respect of other stipulations therein mentioned, and the promise to pay demurrage in case of detention is, in effect, a promise to discharge within the limited time, or pay for the detention" (*Stindt* v. *Roberts* (1848), 5 D. & L. 460, at p. 473 : *Erle*, J.).

3. "In *Leer* v. *Yates* (1811), 3 Taunt. 387, the Court of Common Pleas held, after taking time to consider, under a similar bill of lading that the consignee was liable for demurrage, though he was prevented from getting his goods by the delay of other consignees whose goods lay above his. But Lord *Tenterden*, in two subsequent cases, *Rogers* v. *Hunter* (1827), Moo. & M. 63, and *Dobson* v. *Droop* (1830), Moo. & M. 441, dissented from this doctrine, and directed the jury in a similar case that if a consignee cannot get his goods because some other person's goods prevented him, he is not liable for the detention of the vessel. I do not find that this ruling was questioned by motion to the court, nor do I find any subsequent decision on the point. *Leer* v. *Yates* (1811), 3 Taunt. 387, has, however, been repeatedly quoted as an authority, and is, I think, upon principle a sound decision" (*Straker* v. *Kidd* (1878), 3 Q. B. D. 223, at pp. 226, 227 : *Lush*, J.).

4. "We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days. This is the doctrine laid down by Lord *Ellenborough* in *Randall* v. *Lynch* (1810), 2 Camp. 352, at pp. 355, 356, which was upheld by

this court; and it has been accepted as the guiding principle ever since: see *Leer* v. *Yates* (1811), 3 Taunt. 387; *Harper* v. *M'Carthy* (1806), 2 B. & P. N. R. 258, at p. 267; *Brown* v. *Johnson* (1842), 10 M. & W. 331, and the other cases cited in the argument.

"The obvious convenience of such a rule, in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to, whatever may be the form of words used in the particular charter-party" (*Thiis* v. *Byers* (1876), 1 Q. B. D. 244, at pp. 249, 250: *Lush*, J., delivering the judgment of the court (*Blackburn* and *Lush*, JJ.).

5. "The true result of the authorities therefore is, that a bill of lading in which the words 'and all other conditions as per charter-party,' follow the expression 'on paying freight,' or 'paying for the said goods,' or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charter-party to which it refers" (*Porteus* v. *Watney* (1878), 3 Q. B. D. 534, at p. 538: *Thesiger*, L.J.)).

As to a strike being an "ordinary vicissitude," see *Budgett & Co.* v. *Binnington*, [1891] 1 Q. B. 35 (C. A.)

The Owners can and the Master cannot Maintain an Action in his own Name upon an Implied Promise to Pay Demurrage.

"We think, however, the best and safest course is to abide by that decision [*Brouncker* v. *Scott* (1811), 4 Taun. 1]. The inconvenience resulting from it may be obviated by the insertion of a few words in the margin of the bill of lading, as is often done, and as was done in the case of *Jesson* v. *Solly* (1811), 4 Taun. 52, in which it was held that the master might maintain the action" (*Evans* v. *Forster* (1830), 1 B. & Ad. 118, at pp. 121, 122: Lord *Tenterden*, C.J.).

"The rule [for a new trial on the ground of misdirection] was moved upon the notion that two cases,—*Brouncker* v. *Scott* (1811), 4 Taun. 1, and *Evans* v. *Forster* (1830), 1 B. & Ad. 118,—governed it. To these I may add *Stindt* v. *Roberts* (1848), 5 D. & L. 460. The rule relied on there was, that, upon an implied contract, the owners must sue, not the master. Those cases, however, were actions against the consignees for delay in taking out the goods. They are wholly inapplicable to a case like this, of an action by the master against the consignor for the breach of a contract contained in the bill of lading" (*Cawthron* v. *Trickett* (1864), 15 C. B. (N.S.) 754, at pp. 758, 759: *Willes*, J.).

SECTION XIX.

AVERAGE AND CONTRIBUTION. (180)

(a) *How the Right to General Average arises*, p. 701.
(b) *Right of the Shipmaster to jettison Goods*, p. 703.
(c) *Governing Principle of General Average*, p. 704.
(d) *Rights and Remedies in respect of Average*, p. 708.
(e) *Exceptions to the Rule of Contribution for General Average*, p. 710.
(f) *Damages comprised in General Average*, p. 714.

(a) How the Right to General Average arises.

"By what law does the right arise to general average contribution? Lord *Bramwell*, in his judgment in *Wright* v. *Marwood* (1881), 7 Q. B. D. 62, at p. 67, considers it to arise from an implied contract, but although I always have great doubt when I differ from Lord *Bramwell*, I do not think that it forms any part of the

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(180) A vessel sailed from Shields bound for Providence, Rhode Island, and in consequence of a storm part of the cargo was jettisoned, and the vessel was obliged to put back into Cowes for repairs. On her arrival at Providence, a general average was made up, including the wages and maintenance of the crew at Cowes. It was held that the rule of general average prevailing at Rhode Island, and not the English rule, was to be adopted, though the policy was made at a British port (*McGivern* v. *Stymest*, 10 N. B. R. 320).

The master of a ship, who has signed the usual bill of lading, is not liable for a loss by the *jettison* of goods which have been laden on deck with the knowledge and consent of the shipper and consignee. The master is not estopped by the bill of lading from showing that the goods are to be laden on deck (*Johnston* v. *Crane*, 3 N. B. R. 356, and 4 N. B. R. 39).

Where the owner of a ship is also the owner of part of the cargo which was thrown overboard for the preservation of the ship in the course of the voyage, on which insurance was effected, it was held that such owner mght recover from the insurer on the ship the average proportion which the ship would be liable to contribute to the loss sustained by such jettison of the cargo. When the goods are laden on deck, according to the custom of a particular trade, the owner thereof is entitled to contribution in general average for a loss by jettison (*Marks* v. *Watson*, 4 N. B. R. 211).

Whenever it is shown that the loading of cargo on deck is lawful by reason of contract, or the usage of trade, the rule of the maritime law as to general average contribution applies, and all the interests in jeopardy are bound to contribute for any portion of the cargo jettisoned for their preservation, and the legal right to contribution which results therefrom can only be repelled or displaced by a plainly established usage negativing the claim to such contribution, the burden of establishing which is upon the defendant. An action for contribution for goods jettisoned will lie although the master has signed clean bills of lading for them, and should not have stowed them on deck (*Cameron* v. *Domville*, 17 N. B. R. 647).

"By a well known rule of the maritime law, any part of the cargo of a

contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all" (*Burton* v. *English* (1883), 12 Q. B. D. 218, at pp. 220, 221: *Brett*, M.R.).

"General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may if you like imagine that those who place their property on board a ship on the one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act

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vessel which is necessarily thrown overboard for the preservation of the ship and cargo is entitled to general average contribution from the different interests which had been in jeopardy. Engrafted on this rule by an old French ordinance is an exception with regard to whatever part of the cargo is stowed on deck. By that ordinance there is no general average contribution allowed for jettison of deck cargo. Such an exception, however, has never received unqualified recognition in the law of England. [The learned judge, after commenting on the cases, proceeded.] These cases clearly establish that the exception, created by the French ordinance, does not prevail in our law when either by the usage of a trade, or the contract of the parties, the carrying of the deck load is lawful. As soon as the lading or risk is shown in either of these ways to have been lawful, the rule of the maritime law applies, and all the interests in jeopardy shall contribute for any portion of it jettisoned for their preservation.

"It was argued that the captain having signed clean bills of lading for the goods jettisoned, they should not have been laden on deck, and the master having stowed them there in violation of his contract, contribution could not be claimed for them, for *ex turpi causa non oritur actio*. But this is a misapplication of the maxim altogether. The right to contribution here does not at all depend upon the contract between the shipper and the shipowner, but upon the goods, according to the usage of the trade, having been lawfully laden on deck" (*ibid.*: *Duff*, J., pp. 649, *et seq.*).

done by the captain as agent, not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest" (*ibid.*, at p. 223: *Bowen*, L.J.).

See also *Abbott*, C.J., to the same effect, in *Simonds* v. *White* (1824), 2 B. & C. 805, at p. 811, cited by Lord *Blackburn* in *Svensden* v. *Wallace* (1885), 10 App. Cas. 404, at p. 415.

(b) The Right of the Shipmaster to jettison Goods is justified only by necessity.

"Nothing can be better settled than that the master has a right to exercise this power (the discretion of an authorised agent) in case of imminent danger: he may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the *whole* cargo overboard. —The only obligation will be, that the ship should contribute its average proportion. It is said, this power of throwing over the whole cannot be, but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So likewise with respect to any proportion, he can be justified only by that necessity; nothing short of that will do—the mere convenience of better sailing, or more commodious stowage will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in degree" (*The Gratitudine* (1801), 3 Rob. Ad. Rep. 240, at p. 258: Sir *W. Scott*). (181)

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(181) Where the stranding of a ship is the result of the ordinary perils of the seas without any sacrifice on the part of the master, the expenses incurred must fall upon the ship alone. A vessel was disabled by a gale near a lee shore, so that she could not work off, and after the anchors had dragged until she began to pound on the bottom, the master, with the view, not of saving the cargo, but of enabling the crew to escape, headed her round to the shore, when she was stranded and abandoned by the crew, and the defendant, the owner of the cargo, afterwards got it out at his own expense:—*Held*, that the stranding was not voluntary, and that the cargo was not liable to general average (*Dancey* v. *Burns*, 31 U. C. C. P. 313).

Where a vessel is shown to have been dangerously stranded on a Canadian lake by accident arising from the perils of navigation and without fault of the master it was held that the expense incurred by the master in hiring a steamer to haul her off, with a view to the safety of the vessel and cargo, and by which he was enabled to proceed to his destination, gave a claim for contribution against the owners of the cargo upon a general average (*Grover* v. *Bullock*, 5 U. C. Q. B. 297).

(c) Governing Principle of General Average.

(i.) All loss which arises in consequence of extraordinary sacrifices made or expenses *incurred for the preservation of the ship and cargo* come within general average, and must be borne proportionately by all who are interested.

(ii.) Property, whether ultimately saved or jettisoned, *actually at risk*, at any time during which the operation causing the loss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution, provided that in consequence of that operation the whole adventure be preserved from destruction.

(iii.) The purpose for which an act causing loss is done may determine whether it constitutes general average or not.

1. "The governing principle or proposition, which has been adopted in its terms by a succession of English courts as the true statement of the governing principle, is that which was stated by Mr. Justice *Lawrence* in *Birkley* v. *Presgrave* (1801), 1 East 220. It has been considered to be one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate, as show that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country. His proposition is thus expressed [at pp. 228, 229]: 'All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested.' This proposition, read with regard to expenses, will read thus: All loss which arises in consequence of extraordinary expenses incurred for the preservation of the ship and cargo comes within general average. But the loss which arises from an expense is the expense itself. Therefore we must read thus: Every expense incurred for the preservation of the ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of expenditure in respect of which a general average contribution in any given case is due, the question must be, Was this item of expenditure, at the moment it was incurred, incurred for the safety of both ship and cargo?" (*Svensden* v. *Wallace* (1884), 13 Q. B. D. 69, at pp. 73, 74: *Brett*, M.R.).

2. "It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle

between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger. Next as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This *pro ratâ* indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must therefore be recouped if the loss which the sacrifice causes is to be borne *pro ratâ*. 'All loss,' says Mr. Justice *Lawrence*, in the case of *Birkley* v. *Presgrave* (1801), 1 East, 220, at pp. 228, 229, 'which arises *in consequence* of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who ar interested'" (*ibid.*, at pp. 84, 85 : *Bowen*, L.J.).

Circumstances which merely Impede the Successful Prosecution of the Voyage do not Impose a Liability in the Nature of General Average.

3. "I take it to be settled now that the circumstances which impose a liability in the nature of general average must be such as to imperil the *safety* of ship and cargo and not merely such as to impede the successful prosecution of the particular voyage : *Svensden* v. *Wallace* (1884), 13 Q. B. D. 69 ; *Harrison* v. *Bank of Australasia* (1872), L. R. 7 Ex. 39. I take it also to be settled that if the cargo as a whole be landed and in safety the expenses of getting the ship afloat incurred thereafter are not general average : *Job* v. *Langton* (1856), 6 El. & Bl. 779, a case with which *Moran* v. *Jones* (1857), 7 El. & Bl. 523, has been supposed to conflict, but which does not seem to me, so far as principles are concerned to be open to that observation. It is the decisions, if anything, which are at variance, not the principles upon which they are based. The Master of the Rolls has stated in *Svensden* v. *Wallace* (1884), 13 Q. B. D. 69, that the *decision* in *Moran* v. *Jones* (1857), 7 El. & Bl. 523, cannot be supported, and I refer to the case therefore only to shew that it has not been overlooked. Where the cargo as a whole is safely landed, the shipowner has his ship as she lies, either supposed to be worthless, in which case she will be left where she is, or supposed to be worth something to him, in which case he will be held to spend the money necessary

to rescue her on his own account and for his own purposes only, in which case the expenditure cannot be the subject of general average.

"These principles, though they deal with different epochs, so to speak, in the chain of events which give rise to general average, the first dealing with the state of things at the commencement of the liability, and the other with a state of things at which the liability has terminated, have this in common. Both point to the necessity, in order to establish a case of general average, for the existence of common danger of destruction at the moment when the liability is incurred. This necessity is laid down as the cardinal element necessary to establish a general average contribution in Arnould on Insurance, p. 917 (1st ed.), p. 934 (2nd ed.) where the learned author says, 'All which is ultimately saved out of the whole adventure, *i.e.*, ship, freight, and cargo, contributes to make good the general average loss, *provided it have been actually at risk at the time such loss was incurred, but not otherwise*, because if not at risk at the time of the loss, it was not saved thereby.' This, however, is not a complete statement of what things are liable to general average, for goods jettisoned themselves contribute, and after they are thrown overboard they are no longer at risk: and yet no one ever contended that as each parcel or bale went over the side and was swallowed up by the waves, its liability to be carried into the account of future general average ceased, leaving the burden to be borne in a continually increasing ratio by the ship and its continually decreasing contents. It seems to follow that the loss spoken of must be regarded as a whole, and as that resulting from a continuity of operations. Mr. Arnould's proposition, to make it complete, must be amplified. Property, I think it may be said, whether ultimately saved or jettisoned, actually at risk at any time during which the operation causing loss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution, provided that in consequence of that operation the whole adventure be preserved from destruction, because, if it was not at risk during any part of that time, no adventure of which it formed one of the constituents was saved by the operation. It is clear that Mr. Arnould's 'loss' includes both jettison and expenditure to save ship and cargo from destruction.

"It is obvious that if, in such a case, portions of cargo removed from the ship instead of being jettisoned are carried on shore in lighters and put in a place of safety, or are kept in the lighters and ultimately replaced in the ship, questions may arise whether such treatment is to be considered as the equivalent of jettison, or

as the equivalent of remaining on board the ship, in either of which cases, as it seems to me, the liability to general average must ensue, or as a removal of a totally different character not subjecting the goods to contribution. If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do to that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case and that of actual jettison, so far as liability to general average is concerned. But if the lightening of the ship formed no part, or no appreciable part, of the purpose for which the removal was effected, if the object of the removal was not to minimise the cost of jettison but to get out of harm's way the thing removed and to prevent it from being or remaining at risk at all, it seems to me that a different result may very well ensue, and that a portion of cargo landed under such circumstances may well be regarded as separated from the adventure, and no longer liable to contribution. There is authority for saying that the purpose for which an act causing loss is done may determine whether it constitutes general average or not [Abbott on Shipping, 7th ed., 479]" (*Royal Mail Steam Packet Co.* v. *English Bank of Rio Janeiro* (1887), 19 Q. B. D. 362, at pp. 370—373 : *Wills*, J.).

Extraordinary Expenditure for the Protection and Benefit of the Whole Adventure.

4. A vessel called the *Sir Walter Raleigh*, laden with a valuable cargo of wool, took the ground near Audresselles on the coast of France. The shipowner, who was in Aberdeen, as soon as he heard of the disaster employed a firm in London who had experience in salvage operations and in dealing with disasters of this description. Very speedily the firm in London made an arrangement with a French firm, whose influence and position greatly facilitated the proceedings.

"My Lords, I know of no principle of law which prohibits a shipowner acting in such a reasonable manner, or which prohibits him, if he so acts and the disaster thus leads to extraordinary expenditure, seeking to distribute that extraordinary expenditure over the interests which were sought to be protected, and were protected and benefited by it" (*Rose* v. *Bank of Australasia*, [1894] A. C. 687, at p. 698 : Lord *Herschell*, L.C.).

(i) Rights and Remedies in respect of Average.

There is a lien on the cargo for the expenses successfully incurred for the purpose of saving it alone. (182)

General Average—Particular Average– Lien of Shipmaster therefor.

"As to the question whether there was a lien on the cargo for the expenses successfully incurred for the purpose of saving it alone, there is, considering how often the case must have occurred, a remarkable dearth of authority. In insurance law, the phrase 'general average' is commonly used to express what is chargeable on all, ship, cargo, and freight, and 'particular average,' to express a charge against some one thing. In Phillips on Insurance, c. 15, s. 1, sub-s. 1273, it is said, 'General averages are usually cases of sacrifice for the entire interest at risk in ship, freight, and cargo, and hence called "general." But a contribution may be by part of those interests, where only a part is in peril and benefited by the expenses and sacrifices.' And again, in c. 16, s. 4, sub-s. 1470: 'Where expense is incurred on divers articles in common, the adjustment is made by an average on the respective articles according to their value.' In *Moran* v. *Jones* (1857), 7 El. & Bl. 523, this court held that the cargo, ship, and freight were, in that case, all saved by one continuous operation, but they expressed a decided opinion that if the expense had been incurred after the cargo was safe, for the benefit of ship and freight alone, they would, as between the two, have been general average, to which the ship and freight were to contribute rateably. This, we think, confirms the opinion expressed in Phillips on Insurance.

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(182) "If the vessel were seaworthy at the commencement of the voyage, and by perils of the sea got afterwards damaged, so that it was necessary to hire a steam pump to save the ship and cargo, the expense of such pump would be a proper item for general average" (*Chaffey* v. *Schooley*, 40 U. C. Q. B. 169: *Wilson*, J.).

A vessel loaded with coal, stranded. The owners of the cargo desired to take the coal out, which could have been done at small expense, but the underwriters of the ship refused to permit this, as it would much increase the risk to the vessel. Extraordinary expense was gone to for the purpose of saving both the vessel and cargo, and most of the cargo was saved, but the vessel was a total loss:—*Held*, that the owners of the cargo were only liable to pay a reasonable amount for the cost of saving the coal, and that there was no claim for general average against the coal saved (*Western Assurance Co.* v. *Ontario Coal Co.*, 19 O. A. R. 41, affirmed by Supreme Court, 21 S. C. R. 383).

"In the first place, the coal which formed the schooner's cargo and the vessel herself were never in that common peril which is the very foundation of the right to claim for general average" (*Strong*, J.: *ibid.*).

"It may be said that these are only authorities that expenses of this kind are so far in the nature of general average that they can be charged against the articles, and must be paid for by the underwriters, and that it does not follow that the lien which is given for general average, strictly so called also exists for the particular average chargeable against several articles in common, and so in the nature of general average. That may be true, but every reason for giving a lien for the contribution, when all are to contribute, exists for giving it when several articles are to contribute; and if, where the cargo belongs to several owners, there would be a lien on each part of the cargo for contribution from the owners of that part, it follows that there must be a lien on the whole cargo where it belongs to one only.

"The captain is entitled in case of need, to incur extraordinary expenses for the protection of a particular article, and in some cases he is compellable to do so: see *Notara* v. *Henderson* (1870), L. R. 5 Q. B. 346; (1872), 7 Q. B. 225.

"In practice, such expenses are always in this country charged in the adjustment against the articles in respect of which they are incurred; and in the judgment of the Exchequer Chamber in the case just cited, delivered by *Willes*, J. (L. R. 7 Q. B., at p. 233), there are authorities cited to shew that such is the law in many foreign States. It is not expressly said that there is a lien on the goods for such a particular average, but the hardship would be very great if a master was bound to make a disbursement for the benefit of the goods, and had no remedy if the goods-owner transferred the property and then became insolvent. And, as *Willes*, J., cites these authorities with a view to shew that there was no hardship in holding the master bound to make such disbursements, we think that it is not too much to infer that this very learned judge thought there was such a lien, though it certainly was not decided that there was one.

"The case is very analogous to general average and to salvage, in both of which there is a lien. It is just and convenient that there should be such a lien, and what scanty authority we can find all points in the direction of there being a lien, and we think that we must hold that there is one" (*Hingston* v. *Wendt* (1876), 1 Q. B. D. 367, at pp. 371, 372, 373: *Blackburn*, J., delivering the judgment of the court (*Blackburn* and *Lush*, JJ.).

Rights and Remedies of Owners of Jettisoned Goods.

A. Each owner of goods jettisoned for the common benefit becomes a creditor of the ship and cargo saved, and has a direct claim against each of the owners of the ship and cargo for a *pro ratâ*

contribution towards his indemnity which he can enforce by a direct action.

B. Each such owner has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. Such right of lien can only be enforced through the shipmaster, who is answerable for neglecting to enforce such lien.

(e) Exceptions to the Rule of Contribution for General Average.

1. When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, he is not entitled to contribution.

2. The owners of goods stowed on deck, unless, according to the established custom of navigation, the placing of goods upon the deck is permitted or the other owners of cargo under hatches have consented that the goods jettisoned should be carried on the deck of the ship, are not entitled to contribution. (183)

The above rules, A., B., 1, 2, will be found, and the reasons on which they are based are given, in the following extract:

"The first question [that innocent owners of cargo sacrificed for the common good, are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice

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(183) The owners of goods stored under the deck of a vessel are not liable to contribute by way of general average to the loss of goods laden on deck and thrown overboard from necessity in a storm, and with the hope of saving the ship and cargo (*Gibb* v. *McDonnell*, 7 U. C. Q. B. 356).

"We think there is really nothing to be settled in this case but the question—whether the owner of the cargo stowed under deck is liable to contribute upon a general average to the owner of deck cargo thrown overboard for the preservation of the vessel, under such circumstances as are stated; for admitting the claim to such contribution to be legal, the calculation would not be affected by the claim set up on the part of the owners of the vessel to average, on account of expenses occasioned by the stranding, for the reason that the stranding was not voluntary, as is shown by the evidence, any further than that the master selected one place for going ashore rather than another, when the going ashore was inevitable. The vessel was scudding before the wind towards the shore, was not in a condition to keep the lake, and was found too deep to enter the harbour. In order to save the vessel and crew from destruction, by being cast on a bold rocky shore, towards which they were driving, she was what is called beached—that is, run ashore on a sand beach, which was selected as affording a chance of safety. It has been held 'that the mere steering of a vessel to a less dangerous place for stranding, when she is inevitably driving to the shore is not a voluntary stranding.' The owners of the ship did not in this case make any voluntary sacrifice for the preservation of the cargo—they could not help themselves. It is a description of loss for which all parties must look to their insurers—a case of wreck from the perils of navigation" (*Robinson*, C.J.: *ibid.*).

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Defendants insured the plaintiff's vessel by a policy containing nothing as to deck loads. A hold full and a deck load of coal was shipped upon her at Cleveland for Toronto by a bill of lading which provided "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo, which was thereby accomplished. It was admitted that the usage at the date of the policy, as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads:—*Held*, looking at the special terms of the bill of lading, that the defendants were not liable to contribute to their share of the loss (*Spooner* v. *Western Assurance Co.*, 38 U. C. Q. B. 62).

"I am inclined to think that upon the special case before me, the defendants are not liable to contribute to the plaintiffs, the owners of the vessel, the amount claimed as general average on account of the jettison of the deck load, being carried at the plaintiff's own risk, as shown by the bill of lading. I cannot say that the existence of a usage to carry deck loads includes with it a rule that such deck load, when jettisoned, is entitled to participate in general average. After considering the authorities and text writers referred to, I have come to the conclusion that, as a general rule, a deck load is not a subject of general average, and that the exceptions to this rule arise when there is some contract or understood usage or custom applicable to particular vessels or voyages providing that a deck load, when jettisoned, shall be the subject of general average. Again, this is not a case where the owner of the deck load claims to be entitled against a co-shipper of goods, but it is a claim for contribution by the owner of the vessel, who shipped the deck load at his own risk, against the underwriters of the vessel upon a policy silent as to deck loads" (*ibid.*: *Morrison*, J.).

"The general rule is, that goods necessarily thrown overboard for the preservation of the ship and cargo, shall be entitled to a general average contribution. An apparent exception to the rule is, that goods laden on deck shall not receive contribution. The reason apparently is, that in sea-going vessels the deck is considered an improper place for cargo, and that cargo, when placed there, generally impedes the navigation and increases the risk.

"In *Grouselle* v. *Ferre et al*, in this court 6 O. S. 454, which was an action by the shipper against the shipowner, the cargo carried on deck was wine. It was proved to have been taken on deck with the consent of plaintiff's agent. It was also proved that the custom is, to carry deck loads on schooners navigating the lakes. *Gould* v. *Oliver* was followed, and the plaintiff, as the owner of the cargo, was held entitled to recover against the shipowner. Sir *John B. Robinson* spoke of the usage to carry deck loads on our lakes as 'notorious and universal,' and also said 'the nature of the navigation on our inland waters makes the usage a reasonable one,' but he doubted if the recovery could, in such a case, be had as for a general average."

If the matter were *res integra*, and I were unfettered by the terms of the bill of lading, I should, looking at the admission in the case that it was usual at the date of the policy as well as at the time of the loss for vessels trading between Toronto and Cleveland to carry deck loads, and the absence of any statement, that deck loads do not, according to the usage, give a claim to general average contribution, feel compelled to decide the general question against the underwriters. But looking at the special terms of the bill of lading that 'all property on deck at the risk of the vessel and owners,' looking at the contrariety of decisions bearing on the question, and consequent doubtful

was brought about by the shipmaster's fault] raised is one of general importance, and, so far as their lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (1813), 3 Camp. 480, at p. 485, Lord *Tenterden* said: 'If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper, whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy.'

"Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the shipmaster, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. . . .

"Whether the rule [of contribution] ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected

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state of the law, I think it better to give the defendants the benefit of the doubt" (*ibid.*: *Harrison*, C.J.).

The case of *Spooner* v. *Western Assurance Co.*, 38 U. C. Q. B. 62, shows that a custom to carry deck loads and to treat them as general average may be shown. There are many authorities referred to in that case establishing that a custom of the kind is valid and allowable. See also *Steinhoff* v. *Royal Canadian Insurance Co.*, 42 U. C. Q. B. 307.

whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

"There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice.

"When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (1863), 14 C. B. (N.S.) 59, is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Chief Justice *Erle*, and *Willes* and *Keating*, JJ..

"The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship. . . .

"The negligent navigation of the master cannot, in the opinion of their lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution.

They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognised in *Schloss* v. *Heriot* (1863), 14 C. B. (N.S.) 59, are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves" (*Strang, Steel & Co.* v. *A. Scott & Co.* (1889), 14 App. Cas. 601, at pp. 605, 606—610: Lord *Watson* delivering the judgment of the Judicial Committee). (184)

(f) Damages comprised in General Average.

For the principles upon which the damages to be made good in general average are to be ascertained, see *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Co.*, [1899] 2 Q. B. 403, at p. 410: *Bigham*, J.; and also *ante*, p. 663, Section XVII.—Damages.

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(184) See *Avon Marine Insurance Co.* v. *Barteaux*, 2 Geldert & Oxley N. S. Reps. 195.

A liability to general average contribution arises only when both ship and cargo are in imminent and uncontemplated peril, and there is expenditure or sacrifice to secure their safety. There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such occurrence is to be expected, ice forms in a harbour when a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage (*Kidd* v. *Thomson*, 26 O. A. R. 220).

"There can be no general average if the expenditure is made to avert a peril contemplated by the voyage, and thus within the scope of the shipowner's duty. The onus is upon the plaintiffs to establish a loss which entitles them to demand contribution in general average from the defendants. They must show that not only was the present safety of the adventure the result of the expenditure, but that to obtain it was the object and motive of the sacrifice.

"The charter was made at a very advanced period in the season of upper lake navigation, and it is, I think, a reasonable inference that the owners, when making their contract or charter, contemplated the possibility, and even probability, of encountering difficulties from early ice. Ice at that season of the year cannot be regarded as other than a common lake risk, which it is the duty of the owners of a ship to overcome if at all possible" (*Lister*, J.A.: *ibid.*).

SECTION XX.

STOPPAGE IN TRANSITU.

(*a*) *Stoppage in Transitu and Lien compared*, p. 715.
(*b*) *Definitions of Stoppage in Transitu*, p. 716.
(*c*) *Criteria as to Stoppage in Transitu*, p. 717.
(*d*) *Doctrine founded upon the Custom of Merchants*, p. 718.
(*e*) *Doctrine construed favourably to the Unpaid Vendor*, p. 720.
(*f*) *Sale of Goods Act*, 1893, p. 721.

See also, *ante*, p. 525, Section XII.—Title of Third Person.

The law of stoppage *in transitu* is fully dealt with in Abbott's Law of Merchant Ships and Seamen, 13th ed., to which the reader is referred. However, as the doctrine affects carriers of goods and other bailees for the purpose of transmission to a buyer, it certainly should not be wholly passed over in a work on bailments; some of its main characteristics will, therefore, be now dealt with. (185)

(a) Stoppage in Transitu and Lien compared.

"1st. Neither of them [the right of stopping goods *in transitu*, and the nature and principle of liens] is founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu* or not: he has

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Canadian Cases.

(185) The Ontario Statute, 33 Vict. c. 19, now R. S. O., 1897, c. 145, follows the Imperial Statute, 18 & 19 Vict. c. 111. Section 5 [s. 5 (2) of the R. S. O., c. 145] declares that every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of action and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made to himself. This section is substantially the same as 52 Vict. (D.) c. 30, s. 1.

By the acceptance of the goods the property becomes vested in the purchaser from the time of their delivery to the carrier and whatever right of action the seller had under the bill of lading in respect of the goods up to the time of acceptance passed upon acceptance by the purchaser to him (*Langdon* v. *Robertson*, 13 O. R. 497; *Friendly* v. *Canadian Transit Co.*, 10 O. R. 756, is authority for this rule).

a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods, has no right so to do; he can only retain them till the original price be paid . . .

"2ndly. Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone.

"3rdly. The right of stopping *in transitu* is founded wholly on equitable principles, which have been adopted in courts of law; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an innkeeper, deliver up the goods, his lien is gone" (*Lickbarrow* v. *Mason* (1793), 6 East, 20 n., at pp. 27, 28: *Buller*, J.).

(b) Definitions of Stoppage in Transitu.

"When goods have been shipped upon credit, and the consignee has become a bankrupt, or failed, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, allows him, in many cases, to countermand the delivery, and, before or at their arrival at the place of destination, to cause them to be delivered to himself, or to some other person for his use. This is usually called *stoppage in transitu*" (Abbott, 5th ed., p. 364; 13th ed., p. 669). (186)

For a statutory definition see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 44, *post*, p. 722.

"Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit

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Canadian Cases.

(186) A transitus which would not have been at an end so as to exclude right of stoppage *in transitu*, the goods not having come into the possession of the consignees, may yet be at an end so as to exclude conditions applying "to carriage" only attaching. Thus, when damage was done to goods after arrival at their final destination and before a reasonable time had elapsed for plaintiffs to have removed them, defendants were held to be liable (*Fitzgerald* v. *Great Western Rail. Co.*, 39 U. C. Q. B. 525).

So long as transitus is not at an end the right to stop exists, and plaintiffs (vendors) are entitled as against the assignees of defendants (purchasers) (*Lewis* v. *Mason*, 36 U. C. Q. B. 590. See also *Ascher* v. *Grand Trunk Rail. Co.*, 36 U. C. Q. B. 609).

connected with the transmission and delivery of them, and until they arrive at the actual constructive possession of the consignee" (Abbott, 5th ed., p. 374; 13th ed., p. 679).

"As long as the goods remain in the warehouse of the vendor, or in the hands of one who holds as his agent, his lien upon them for the unpaid price remains. But, when once they have got into the possession of an agent for the buyer, the vendor parts with his lien. The right to stop *in transitu* upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu*. It must be observed that there is, besides the propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz., that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such as that the buyer has taken actual or constructive possession of the goods; and that cannot be so long as he repudiates them. This is the alphabet of the doctrine of stoppage *in transitu*" (*Bolton* v. *The Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431, at pp. 439, 440: *Willes*, J.).

As to when goods are deemed to be in course of transit, see *Ex parte Cooper, In re McLaren* (1879), 11 Ch. D. 68; *Ex parte Rosevear China Clay Co., In re Cock, ibid.*, 560; s. 45 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), *post*, p. 724, and *ante*, p. 499, Section XI.—End of Transit.

(c) Criteria as to Stoppage in Transitu.

"Now there are two *criteria*, as it appears to me, with respect to the stoppage *in transitu*, viz., whether there is a *transitus* at all? and if so, where it is to end? If a man sends his own ship, or orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery and the *transitus* is at an end, just as much (as was said in *Van Casteel* v. *Booker* (1848), 2 Ex. 691, at p. 699) as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery. The next thing to be looked to is, whether there is any intermediate person interposed between the vendor and the purchaser. Cases no doubt may arise, where the *transitus* may be at an end although some person may intervene

between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done ; for the goods have been put in the place indicated by the purchaser, and there is an end of the *transitus*. But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name, and, being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage is terminated and the freight paid according to the arrangement in the charter-party" (*Berndtson* v. *Strang* (1867), L. R. 4 Eq. 481, at pp. 489, 490 : Sir *W. Page Wood*, V.-C.).

(d) Doctrine founded upon the Custom of Merchants.

"The doctrine as to stoppage *in transitu* is not founded on any contract between the parties : it is not founded on any ethical principle ; but it is founded upon the custom of merchants. The right to stop *in transitu* was originally proved in evidence as part of the custom of merchants ; but it has afterwards been adopted as a matter of principle, both at law and in equity. It is analogous to, but not the same as, the right of an unpaid vendor to retain the goods when the purchaser has become insolvent. If there has been a delivery of goods to the vendee and an appropriation of them to his own use, the right of stoppage does not exist : in a case of that kind the property in, and the possession of, the goods have passed to the vendee ; but where the goods are in the course of transit from the vendor to the vendee, although the property has passed to the vendee, and although he has the constructive possession of them, the right to stop prevails. Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a constructive possession exists in the vendee : nevertheless, whilst the goods are in the hands of the carrier, they are in the course of transit, and the right of stoppage may arise. There is another kind of constructive possession by the vendee ; that is, when the goods have been delivered by the carrier, and have reached the hands of an agent to the vendee to be held at his disposal. When the goods are in actual transit, hardly any difficulty occurs in determining

the rights of the parties. But there may be a difficulty, when the goods are in the hands of an agent to be held by him at the disposal of the vendee: the goods may not have reached the end of the transit as originally contemplated, they may have come only to an intermediate stage. The question is not necessarily solved by what was said before the contract was entered into; but what was said may be a material fact to be considered, because it may determine where the transit ended. I think that the definition of the *transitus* is well given in Abbott on Merchant Ships and Seamen, part 3, ch. 9, p. 374 [5th ed.], and part 4, ch. 10, p. 409 [12th ed.] (Part III. ch. IX., p. 679, 13th ed.): the principle is there stated in the following term: 'Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee.' It is clear that the author, in the latter part of this definition, is alluding to the second kind of constructive possession: if the wording of the latter clause may be enlarged, I should prefer it to stand thus: 'But also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly" (*Kendal* v. *Marshall, Stevens and Co.* (1883), 11 Q. B. D. 356, at pp. 364, 365: *Brett*, L.J.). (187)

Canadian Cases.

(187) The plaintiffs at Montreal having sold goods on credit to H. & Co., living at Meaford, shipped them by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood. While they were at Collingwood, defendants received notice of stoppage *in transitu*, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice, and the plaintiffs thereupon brought trover:—*Held*, that the action would not lie, for the goods by the sale and delivery to the carrier were at the purchaser's risk, and the stoppage *in transitu* did not give the plaintiffs the right of property and possession necessary to maintain trover (*Childs et al* v. *N. R. C.*, 25 U. C. Q. B. 165).

"The carrier cannot alter his position from that of a mere carrier and undertake to hold the cargo for the consignee, unless something equivalent to an attornment is shewn on the carrier's part so that he has altered his position and holds the goods in another capacity, the transitus is not at an end" (*Hagarty*, C.J.O., in *McLean* v. *Breithaupt*, 12 O. A. R. 390).

"The result of the authorities is clearly that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the

"It has often been said that it is difficult to explain the ground upon which the right of stoppage *in transitu* rests. An explanation of the doctrine is given in the judgment of Lord *Abinger*, C.B., in *Gibson* v. *Carruthers* (1841), 8 M. & W. 321, at p. 336. The right of stoppage *in transitu* is founded upon mercantile rules and is borrowed from the custom of merchants; from their custom it has been engrafted upon the law of England. The doctrine was at variance with the principles of the civil law, which laid down that although the goods had been sold upon credit, and although the goods were in the possession of the vendee, there might be reception by the vendor if the vendee became insolvent. But according to the rules as to stoppage *in transitu* the goods can be stopped only whilst they are passing through channels of communication for the purpose of reaching the hands of the vendee. This doctrine was adopted by the Court of Chancery; and afterwards by Courts of Common Law. It is difficult to say how long the transit of goods continues; but it is a rule accepted by English law that they can be stopped only during their transit to the vendee, and it is not to be forgotten that stoppage *in transitu* is an expansion of the ordinary rights of a vendor. The nature of the transit is explained by the passage which *Brett*, L.J., has read from Lord *Tenterden's* work. It is there pointed out that the goods are in transit until they reach the actual or constructive possession of the consignee. The transit is at an end when the vendee takes actual possession of them; it is at an end when some person acting on behalf of the vendee receives them from a carrier. The latter is an instance of constructive possession" (*ibid.*, at pp. 368, 369: *Bowen*, L.J.).

(e) Doctrine construed favourably to the Unpaid Vendor.

"The doctrine of stoppage *in transitu* has always been construed favourably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the

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Canadian Cases.

purchaser or of some one who receives them in the character of his servant or agent. That, as laid down in *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560, and referred to in *Kendall* v. *Marshall*, is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary" (*ibid.*: *Burton*, J.A.; and see *Wiley* v. *Smith*, 2 S. C. R. 1; *McDonald* v. *McPherson*, 12 S. C. R. 416).

purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit" (*Bethell* v. *Clark* (1888), 20 Q. B. D. 615, at p. 617: Lord *Esher*, M.R.).

"The law appears to their lordships to be very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell* v. *Clark* (1888), 20 Q. B. D. 615" (*Lyons* v. *Hoffnung* (1890), 15 App. Cas. 391, at p. 397: Lord *Herschell*, delivering the judgment of the Judicial Committee).

(f) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). (188)

PART IV.

Rights of Unpaid Seller against the Goods.

"Unpaid Seller" and "Seller" defined.

Section 38.—(1.) The seller of goods is *deemed to be* an "unpaid seller" *within the meaning of this Act*—

(*a.*) When the whole of the price has not been paid or tendered;

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

Canadian Cases.

(188) An Act respecting Conditional Sales of Chattels, R. S. O., 1897, c. 149, and 62 Vict. New Brunswick, 114.

An Act respecting Mortgages and Sales of Personal Property, R. S. O., 1897, c. 148.

(2.) *In this part of this Act* the term "seller" *includes* any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

See also definition of "seller," *post*, p. 726, s. 62 (1).

As to the meanings of the expressions "deemed to be," "includes," and "means," see *ante*, pp. 186, 187, 196, 445, 482.

Implied rights of Unpaid Seller.

Section 39.—(1.) Subject to the provisions of this Act, and of any statute in that behalf, *notwithstanding that the property in the goods may have passed to the buyer*, the unpaid seller of goods, as such, has by implication of law—

(*a.*) A lien on the goods or right to retain them for the price while he is in possession of them ;

(*b.*) In case of the insolvency [see *post*, p. 726, s. 62 (3)] of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;

(*c.*) A right of re-sale as limited by this Act.

(2.) *Where the property in goods has not passed to the buyer*, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

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Stoppage in transitu. (189)

Section 44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted

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Canadian Cases.

The Sale of Goods Ordinance, Consolidated Ordinance of the N. W. Territories of Canada, 1898, c. 39.

An Act for codifying the law relating to the Sale of Goods, Statutes of Manitoba, 59 Vict. c. 25, and Amending Act, 62 & 63 Vict. c. 36.

An Act for codifying the law relating to the Sale of Goods, R. S. B. C., c. 169.

The statute law of Manitoba, the North West Territories, and British Columbia is taken from the English Sale of Goods Act, 56 & 57 Vict., and is substantially the same.

(189) "The question in this case is as to the exercise of the right of stoppage *in transitu*, and the specific point is, whether or not the transit was at an end when the vendor stopped the goods. In *Lyons* v. *Hoffnung*, 15 App. Cas. 391, the Judicial Committee of the Privy Council adopted the following from Lord *Esher*, in *Bethell* v. *Clark*, 20 Q. B. D. 615, respecting the continuance, and

Canadian Cases.

determination of the transit: 'When the goods have not been delivered to the purchaser, or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu*, and may be stopped.' It is, of course, clear that the mere arrival of the goods at the place of destination does not end the transit. There must be a delivery, actual or constructive, as between the carrier and the consignee. Such delivery may be at the place of original destination, or even (by agreement of carrier and consignee) before the goods reach such place" (*Mollison* v. *Lockhart*, 30 N. B. R., at pp. 401, 403: *King*, J.).

"That the vendor has a right, if unpaid and if the vendee be insolvent, to retake the goods before they are actually delivered, is a principle too clear to admit of any doubt" (*Richardson* v. *Twining*, 2 Geldert & Oxley N. S. Reps., at p. 283: *Desbarres*, J.).

"I am unable to see that this case, under the facts admitted, where the delivery was to the carrier by the consignor who had sold the goods to the consignee, to whom by the terms of the bill of lading they were to be delivered and who was to pay the freight, and who was, in fact, the owner of the goods at the time of the loss complained of, is not the ordinary case where the consignee is the person entitled to bring the action, and I am of opinion that there is nothing here to show a special contract on which the plaintiff can maintain the action" (*Adams* v. *Crosby*, 2 Russell & Geldert, at p. 337: *Wetherbe*, J.).

A delivery to the carrier, when in accordance with directions of purchaser, is a delivery to the purchaser (*Taylor* v. *The Victoria Co-operative Store Co.*, 26 N. S. Reps. 223; *Trueman* v. *Bain*, 25 N. B. Reps. 298).

"Further consideration has satisfied me that when goods have reached their place of destination, and have been delivered by the consignor to the consignee, who has bonded them in his own name, and who has sold and delivered part of the same consignment of goods, the *transitus* must be considered at an end. I have used the word delivered by the consignor to the consignee in the sense that the consignor has performed his contract by bringing the goods to their place of destination, and, as in this case, has been paid his freight, so that he has no lien on them" (*Wiley* v. *Smith*, 2 S. C. R. 10: Sir *Wm. B. Richards*, C.J.).

"The *transitus*, so far as the carrier was concerned, was clearly at an end, and although the consignee may not have had the actual corporal possession of the goods, I think entering the goods at the Custom House, warehousing them under the Revenue warehousing system, and giving his bond for the duties, thereby satisfying all the requirements of the law, was an acceptance of the goods by the consignee, and equivalent to taking actual possession of them, and the warehouse became the warehouse of the vendee as between him and the vendor, and that consequently the *transitus*, so far as the vendor was concerned, was at an end and his right of stoppage ceased to exist" (*ibid.*: *Ritchie*, J.). See judgment of *Strong*, J., *ante*, p. 507.

"By the acceptance of goods, the property becomes vested in the purchaser from the time of their delivery to the carrier, and whatever right of action the seller had under the bill of lading in respect of the goods up to the time of acceptance, passed upon acceptance by the purchaser to him" (*Langdon* v. *Robertson*, 13 O. R. 508: *Cameron*, C.J. See also *Friendly* v. *Canada Transit Co.*, 10 O. R. 756).

with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

When Goods are deemed to be in course of Transit.

Section 45.—(1.) Goods are *deemed to be* in the course of transit from the time they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not *deemed to be* at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is *deemed to be* at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How Unpaid Seller may Exercise his Right of Stoppage in Transitu. (190)

Section 46.—(1.) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods,

Canadian Cases.

(190) *McDonald* v. *McPherson*, 12 S. C. R. 416, *ante*, p. 719.

or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods, or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

How Re-Sale by Buyer affects Right to Stop in Transitu.

Section 47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a *document of title to goods* has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of *pledge* or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee. (191)

As to a pledge of "a document of title to goods," see *ante*, pp. 137, 188; and as to a pledge of a bill of lading, see *ante*, p. 631.

Interpretation of Terms.

Section 62.—(1.) In this Act, unless the context or subject matter otherwise requires, (*inter alia*)—

"Buyer" *means* a person who buys or agrees to buy goods:

"Delivery" *means* voluntary transfer of possession from one person to another:

"Document of title to goods" has the same meaning as it has in the Factors Acts. [See the Factors Act, 1889, s. 1 (4), *ante*, p. 188.]

Canadian Cases.

(191) If before the notice to stop is received, the bill of lading has been indorsed, and notice given to the carrier of such indorsement, the notice of stoppage is insufficient (*Clementson* v. *Grand Trunk Rail. Co.*, 42 U. C. Q. B. 263).

"Goods" *include* all chattels personal other than things in action and money:

"Property" *means* the general property in goods, and not merely a special property:

"Sale" *includes* a bargain and sale as well as a sale and delivery:

"Seller" *means* a person who sells or agrees to sell goods.

(2.) A thing is *deemed to be* done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is *deemed to be* insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not.

As to the meanings of the expressions "means," "includes," "deemed to be," see *ante*, pp. 186, 187, 196, 445, 482.

N.B.—The words above printed in italics are, of course, not so printed in the copy of the Queen's printers; it is merely to call special attention to them that they are so printed here.

Section 63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

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SECTION XXI.

LIEN.

(a) *Definition of Lien*, p. 727.
(b) *The Right of Lien, on what Founded*, p. 728.
(c) *Indorsee of Bill of Lading without Notice of Charter-party*, p. 730.
(d) *Railway Clauses Consolidation Act*, 1845, *s.* 97, p. 731.
(e) *Cloak Room Charges*, p. 732.
(f) *Cesser Clause in Charter-party*, p. 732.
(g) *Abandonment of Lien*, p. 734.
(h) *Merchant Shipping Act*, 1894, *Part VII.*, p. 735.

(a) Definition of Lien. (192)

Lien either arises from the usage of trade, or is given by an express contract. It is the right of a creditor to retain the goods

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Canadian Cases.

(192) The plaintiffs in October shipped ninety-two tons of pig iron, on the defendant's vessel at Montreal, to be carried to Hamilton. She accidentally caught fire in the canal on her voyage, and was destroyed, and the iron sank. The vessel was insured but not the cargo, and the inspector of the insurance company, after consultation with the captain, made a contract for raising the hull, machinery, and cargo. The iron was piled up at the lock ready for shipping in the spring, and was then sent on, but defendant claimed a lien upon it for a portion of the expenses incurred in raising the hull and engine: —*Held*, that there was no such lien; that the services rendered could not be considered as in the nature of salvage service, or general average, the iron not being in danger of destruction or loss (*Gurney* v. *McKay*, 37 U. C. Q. B. 324).

"The first question which arises is, whether at the time of the alleged refusal the defendant had a right to detain the iron against the plaintiffs. The decision of this question must depend on the fact whether or not, as in *Wakefield* v. *Brown*, 43 L. J. C. P. 222, at the time of the refusal the defendant or his principals, was or were in the condition of a person or persons having a lien on the goods. The doctrine of lien originated in certain principles of the common law, by which a party who was compelled to receive the goods of another was entitled to retain them for his indemnity. Thus, carriers and innkeepers had, by the common law, a lien on the goods entrusted to their charge. The rescuer of goods from perils of the sea has, on grounds of public policy, a lien at common law for salvage. And it is a principle that when a person has bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him, he has a lien on it for his charge. But here the rule appears to stop, and not include cases wherein expense has been bestowed upon the object claimed to be retained without producing any alteration in it. It is not claimed by the defendant that there was any

until his debt is paid or satisfied. See *ante*, p. 132, Chapter V.—Pledges; Section I.—Definition of Lien: and *ante*, p. 593, Section XV.—Passengers' Luggage, (e) Lien on Luggage.

(b) The Right of Lien, on what Founded.

The right of lien is not founded on *property* in him who sets it up, but supposes the property to be in some other person.

Lien at law exists only in cases where the party entitled to it has the *possession* of the goods; and if he once part with the possession after the lien attaches, the lien is gone.

Canadian Cases.

express promise to pay for the disputed services, or any agreement for a lien till payment; but it is contended on the facts shown that the law infers the promise, and gives the right of lien—the service having been one in the nature of salvage, or for which a claim may be made as on a general average. No man has, as a rule, the right to force services on another, and by detention of goods or otherwise compel that other to pay for them. One well recognised exception is maritime salvage, another is general average. Principles of public policy and commercial necessity support these exceptions. If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in Courts of Justice.

"Now, for the present, conceding that services performed in one of the canals of the river St. Lawrence are to have some weight, and to be followed by the same consequences as to the rights and liabilities of the parties and their property as if rendered at sea, I shall proceed to inquire whether, according to the principles of maritime law, the services relied on here can be claimed as salvage services. The grounds on which salvage services rest are a marine peril, voluntary service, and success. In this case, there was voluntary service and success, but the inquiry remains whether there was a marine peril. It is an absolute pre-requisite that the cargo should, at the time of the service, be actually or prospectively in danger of destruction.

"It is not shown here by any witness that the vessel took fire on the river, and was for the safety of the cargo driven into the canal as a place for the safety of the cargo, and this, I take it, is a plain distinction between this case and the case of *Rogers* v. *Hooker*, 15 U. C. Q. B. 63, relied upon by the defendant's counsel as an authority in his favour.

"It does not appear that the pig iron if allowed to remain in the canal would have been either destroyed or lost, and there was no witness who so testified, and for this reason the claim, if any, of the defendant to a lien must, I think, be rested on some other ground than maritime salvage" (*ibid.*: *Harrison*, C.J.).

There can be no appropriation by way of lien of chattels susceptible of delivery, which will prevail against other persons, without a delivery good at common law (*Malcolm* v. *Harnish*, 27 N. S. Reps. 262).

1. "Neither of them [the right of stopping goods *in transitu*, and the nature and principle of liens] is founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his, he has a right to the possession of them whether they be *in transitu*, or not: he has a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods, has no right so to do; he can only retain them till the original price be paid" (*Lickbarrow* v. *Mason* (1793), 6 East, 20 n., at p. 27: *Buller*, J.).

2. "Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone" (*id.*).

3. "The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage of them to London: the custody therefore was changed by the delivery to the captain. In the case of *Kinlock* v. *Craig* (1789), 3 T. R. 119, afterwards in Dom. Proc. (1790), *ibid.*, 783, where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this court and afterwards in the House of Lords: though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived" (*Sweet* v. *Pym* (1800), 1 East, 4, at p. 5: Lord *Kenyon*, C.J.).

A Carrier has a Lien for his Hire. (193)

Action of trover against the defendant, a common carrier, for goods delivered to him to carry, etc. Upon not guilty pleaded, the defendant gave in evidence that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff

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Canadian Cases.

(193) Where a vessel carrying goods is stranded and lost by stress of weather, the master may, to save the cargo, employ another vessel to take it to the place of destination, and the owners of such goods will be liable for any extraordinary expense so incurred in addition to the freight (*Rogers* v. *Hooker*, 15 U. C. Q. B. 63).

refused, etc., and therefore he retained them. And it was ruled by *Holt*, C.J., that a carrier may retain the goods for his hire (*Skinner* v. *Upshaw* (1702), 2 Ld. Raym. 752).

A Carrier has no Lien for his General Balance.

"The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward *to be therefore paid*, by force of which he has a lien only for the carriage price of the particular goods" (*Rushforth* v. *Hadfield* (1805), 6 East, 519, at p. 525: Lord *Ellenborough*, C.J.). (194)

Right of Lien gives no Right to Sell the Goods.

"Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods" (*Pothonier* v. *Dawson* (1816), Holt Rep. N. P. 383, at p. 385: *Gibbs*, C.J. See also pp. 135, 161, 173, 174, 262, 287).

Right of Lien gives Carriers an Insurable Interest.

See *ante*, p. 680, Section XVII.—Damages, and the case of *London and North Western Rail. Co.* v. *Glyn* (1859), 1 E. & E. 652.

(c) Indorsee of Bill of Lading without Notice of Charter-party.

"A *bonâ fide* indorsee for value of the bill of lading, having no knowledge or notice of the charter-party or that the cargo was

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Canadian Cases.

(194) A shipowner's lien for freight extends to every part of the goods belonging to each consignee; and the consignee cannot maintain trover for a part of the goods, which have been landed, on tendering the freight thereon, though the amount due on each package of the goods may be ascertained from the bill of lading. As a general rule, the bill of lading, though containing different descriptions of goods belonging to the same person, is considered as an entire contract (*Neill* v. *Reed*, 9 N. B. R. 246).

If goods, held by the freight agent of the Intercolonial Railway for non-payment of the freight, are replevied by the owner, the agent may claim a special property in the goods under the Consol. Statutes, c. 37, s. 203 (*Rowe* v. *McEwen*, 28 N. B. R. 86. See judgment of *King*, J., in *Owen* v. *Outerbridge*, 26 S. C. R. 272, *ante*, p. 374).

subject to lien for any freight except that mentioned in the bill of lading, and not acting collusively, is entitled to the goods on payment of the freight stipulated for in the bill of lading, and is not affected by the greater liability of the indorser, supposing such liability to exist. It is impossible to distinguish the case from *Gilkison* v. *Middleton* (1857), 2 C. B. (N.S.) 134" (*Foster* v. *Colby* (1858), 3 H. & N. 705, at p. 715: *Pollock*, C.B.).

(d) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

Railway Company's Right to Detain and Sell Carriages and Goods for Unpaid Tolls.

Section 97. If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.

Section 97 applies to Tolls for the use of the Railway only.

"The defendants' claim to detain these goods is based on s. 97 of 8 Vict. c. 20. But on looking at that section it is clear that it refers, not to charges due to the company for the conveyance by them of goods as carriers, but to the case of goods conveyed in the carriages of the owners, who bargain only for the use of the company's line. This is clear, if s. 97 is read in connection with the immediately preceding sections, 95 and 96, which relate evidently to such tolls only. No doubt the word tolls may sometimes have a more extensive signification given to it, but it here means only tolls in the proper sense of the word; that is tolls paid for the use of the railway" (*Wallis* v. *London and South Western Rail. Co.* (1870), L. R. 5 Ex. 62, at pp. 63, 64: *Kelly*, C.B.).

See also *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554).

As to the meaning of the word "toll," see *ante*, p. 482.

(e) Cloak Room Charges.

"The history of the cloak room at railway stations is supplied by the Railway and Canal Traffic Act, 1854 [17 & 18 Vict. c. 31]. There [s. 2, set out *ante*, p. 445] it is enacted that a railway company shall afford reasonable facilities for receiving, forwarding, and delivering traffic. One of the most reasonable of such facilities is the cloak room at railway stations, which has been long established in accordance with that Act of Parliament. The cloak room at Waterloo Station existed under that Act of Parliament, and it is said the principle that applies to the contract of carriage applies to this cloak room, which is provided by the company as part of the reasonable facilities for the traffic on the line. It seems to me that that argument is a sound one, and that the same principle applies. The lien which the defendants had as carriers they had also as owners of the cloak room, and they were entitled, in my opinion, to have payment of their charges in respect of the machine before delivery to the plaintiffs" (*Singer Manufacturing Co.* v. *London and South Western Rail. Co.*, [1894] 1 Q. B. 833, at p. 836: *Mathew*, J.).

(f) Cesser Clause in Charter-party.

"A stipulation for the cesser of liability of the charterers as soon as the cargo is loaded, if it stood alone, would be entirely in favour of the charterers, and is one which, it is obvious, the shipowner would not agree to, unless it were coupled with something else, viz., that the master and owners were to have a lien on the cargo for the charter-party freight. Taking the two branches of the clause together, what is their true construction? They must be construed according to the rule laid down in *Clink* v. *Radford*, [1891] 1 Q. B. 625. It is futile now to say to this court that there were observations, or dicta, or even decisions, before that case which are not consistent with the principle there laid down. It is the last decision of this court on the subject, and we cannot overrule it even if we were disposed to do so. I think that it was a right decision based on sound mercantile reasons. I said in that case [at p. 627]: 'In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in

another part of the contract.' *Bowen*, L.J., said [at p. 629]: 'There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability.' *Fry*, L.J., said [at p. 632], 'The rule that we are *primâ facie* to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive. If that were not so, we should have this extraordinary result: there would be a clause in the charter-party the breach of which would create a legal liability: there would then be a cesser clause destroying that liability: and there would then come a lien clause which did not recreate that liability in anybody else.' It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true that, where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter-party the charterers are enabled to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charter-party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter-party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability" (*Hansen* v. *Harrold Brothers*, [1894] 1 Q. B. 612, at pp. 617, 618: Lord *Esher*, M.R.). See also *Brankelow Steamship Co.* v. *Canton Insurance Office*, [1899] 2 Q. B. 178, at p. 184: *A. L. Smith*, J. (195)

Canadian Cases.

(195) A contract made subsequently to a charter-party that the cesser clause should not be set up is a good answer on equitable grounds to a plea of the cesser clause, though such clause forms part of the charter-party as declared on (*Lovitt* v. *Snowball*, 32 N. B. R. 643, and see *Nickerson* v. *Commercial Union Assurance Co.*, 33 N. F. Reps. 250).

(g) Abandonment of Lien.

Abandonment of Lien is Evidence from which a Contract to Pay Freight may be inferred.

"It is not disputed that where a consignee takes delivery under a bill of lading, and the master of the vessel by giving delivery abandons his lien, there is evidence from which a contract to pay freight may be inferred. This has been regarded as the law ever since *Sanders* v. *Vanzeller* (1843), 4 Q. B. 260; but in that case it was distinctly stated that it was not a presumption of law that such a contract existed, but only a presumption of fact. Inasmuch as a shipowner is entitled to retain goods for the purpose of securing payment of his freight, it is only natural to infer if the goods are parted with to a consignee before the freight is paid, and the lien is thus abandoned, that it could only be on the understanding on both sides that the consignee undertook to pay the freight. And I cannot doubt that in such a case, except under very special circumstances, a jury, or whatever tribunal has to determine the facts, will always find that there was such a contract. But it must be borne in mind that it is only by reason of his lien that the shipowner is entitled to refuse delivery to the owner of the goods or his agent, and I think the abandonment of this right is an essential element in the facts which give rise to the inference of a contract to pay the freight" (*White & Co.* v. *Furness & Co.*, [1895] A. C. 40, at pp. 43, 44: Lord *Herschell*, L.C.).

The Shipowner who has let his Ship for a Voyage may have no Lien on the Goods on that Voyage.

"In the present case, the bankrupt (the charterer) was owner for the voyage, and if he were owner before the bankruptcy, his assignees became owners after it, if the contract be considered as still continuing. The bankrupt, therefore, put his goods on board his own ship, and till those goods were delivered, the voyage was not completed. The master and crew were bound to obey his orders, and, as Lord *Hardwicke* observed in *Paul* v. *Birch* (1743), 2 Atk. 621, the money to be paid to the defendant (the owner of the ship) was rather to be considered as rent for the hire of the ship, than as freight" (*Hutton* v. *Bragg* (1816), 2 Marsh. 339, at p. 350: *Gibbs*, C.J.).

"'The question whether the possession of the ship has or has not been given up to and taken by the charterers, must depend upon the terms of the instrument taken altogether, or upon the

purpose and object of it'" (*The Great Eastern* (1868), L. R. 2 A. & E. 88, at p. 92: Sir *Robert Phillimore*, citing Chief Justice *Tindal*). See also *ante*, pp. 598—605.

(h) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Part VII., which replaced ss. 66 to 78 inclusive of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), deals with the right of lien on goods imported in any ship from foreign parts into the United Kingdom.

"The provisions of the statute (Merchant Shipping Act, 1862) which relate to this question are obviously designed both to give the master the means of discharging the cargo, retaining his lien, and to give the cargo-owner the means of obtaining his goods by the deposit of a sum sufficient to cover the master's claim. But they do not extend the lien. The lien for the warehouse rent and charges occasioned by a landing under the 67th section is another and distinct lien created by the 76th section" (*Miedbrodt* v. *Fitzsimon* (1875), L. R. 6 P. C. 306, at p. 316: Sir *James W. Colvile*, delivering the judgment of the Judicial Committee).

SECTION XXII.

DISTRESS.

Goods entrusted to a Common Carrier to be carried cannot be Distrained.

"Goods delivered to any person exercising a public trade or employment *to be carried*, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; . . . and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in the case, is, as to this privilege, a common carrier: for the law has given the privilege in respect of the trader, and not in respect of the carrier; and the case in Cro. Eliz. 596 is stronger. Two tradesmen brought their wool to a neighbour's beam, which he kept for his private use, and it was held that could not be distrained (*Gisbourn* v. *Hurst* (1710), 1 Salk. 249, at p. 250).

See also, *ante*, p. 263, Chapter VIII.—Hire of Work, Labour and Services; Section X.—Distress; *ante*, p. 281, Chapter IX.—Hire of Custody; Section II.—Warehousemen, (d) Distress; *ante*, p. 287, Section III.—Wharfingers, (e) Distress; and *ante*, p. 334, Innkeepers, Section VI.—Distress.

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